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In The

Supreme Court of the United States

October Term, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an age discrimination case where the defendant offers a legitimate reason for the challenged employment decision and plaintiff claims pretext, is it error to instruct the jury that it may find for the plaintiff if he has proven the elements of a prima facie case without also instructing the jury that the plaintiff retains the ultimate burden of proving age discrimination?

2. In an age discrimination case where evidence is offered of stray comments by subordinates and adverse actions against some other employees by other decisionmakers, but where there is no evidence of age bias on the part of the actual decisionmakers involved in the decision concerning plaintiff's employment, is it sufficient to withstand judgment as a matter of law if the jury finds the elements of a prima facie case and merely disbelieves the reasons offered by the defendant for the employment action?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the appeal in the United States Court of Appeals for the Eighth Circuit, whose judgment petitioners request be reviewed, included petitioners KARE 11, Combined Communications Corporation, and Gannett Co., Inc., and respondent C. Thomas Ryther.

Pursuant to Rule 29.6, petitioners note that KARE 11 is a tradename for Gannett Minnesota Broadcasting, Inc., which is a wholly owned subsidiary of Combined Communications Corporation. Gannett Co., Inc. is the parent company of Combined Communications Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners KARE 11, Combined Communications Corporation, and Gannett Co., Inc. (collectively referred to as "KARE") respectfully petition that a writ of certiorari issue to review the March 6, 1997 en banc decision of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The court of appeals' en banc decision (App. A), dated March 6, 1997, is reported at ___ F.3d ___, 1997 WL 94025 (8th Cir. 1997). The court of appeals' panel decision (App. B) was reported at 84 F.3d 1074 (8th Cir. 1996) (withdrawn from publication). The court of appeals' order granting rehearing en banc and vacating the panel decision (App. D) is dated August 29, 1996, and is published at 95 F.3d 7 (8th Cir. 1996). The district court's opinion on defendants' motion for judgment as a matter of law and new trial (App. C) is reported at 864 F. Supp. 1510 (D. Minn. 1994).

JURISDICTION

The court of appeals' en banc decision of which review is sought was rendered in an opinion filed on March 6, 1997 (App. A). This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a) provides in relevant part:

> (a) Employer practices.
>
> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

STATEMENT OF THE CASE

This case presents two issues that are deeply dividing the lower courts in their handling of an ever-increasing number of discrimination cases. First, courts must grapple with how to instruct juries on the proof required to show discrimination in light of the burden-shifting formula articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as most recently interpreted in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Second, the courts continue to struggle with how to interpret this Court's holding in *Hicks* when ruling on motions for summary judgment or judgment as a matter of law.

Here, the Eighth Circuit, sitting en banc, split evenly on whether the district court inaccurately stated the law in its primary instruction on proof of age discrimination. Even more significant from this Court's perspective, the Eighth Circuit also split evenly on whether the most

widely recognized federal jury instruction treatise, E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* (hereinafter "Devitt & Blackmar"), recommends an instruction which so seriously misstates the burden of proof required in an age discrimination case that it would constitute reversible error to give that instruction. The Devitt & Blackmar instruction purports to reflect the burden-shifting paradigm most recently explained in *Hicks*, but it inaccurately states the burden of proof for the plaintiff. Indeed, the circuits are split on whether jury instructions should include the burden-shifting language at all.

The confusion over jury instructions in the circuits is simply an offshoot of the ongoing circuit division over how to interpret this Court's decision in *Hicks*. The circuits do not agree on whether *Hicks* means that a reasonable jury which finds the prima facie elements and simply rejects the employer's non-discriminatory reason for termination can *always* infer that plaintiff was a victim of intentional discrimination, or whether the court must still make sure that there is sufficient evidence of discrimination *on the basis of age* to sustain a verdict. Here, the en banc decision upheld the district court's denial of KARE's motion for judgment as a matter of law even though plaintiff offered no evidence that age had anything to do with the determination made by the actual decision-makers not to renew petitioner's contract.

A. The Facts Material To This Court's Consideration Of The Questions Presented.

Plaintiff C. Thomas Ryther ("Ryther") was a sportscaster on Channel 11 television station in Minneapolis-St. Paul. Beginning in December 1979, Ryther and Channel

11 entered into four personal service contracts of definite terms, three years each. KARE signed the last contract with Ryther when Ryther was almost 51 years old. Tr. II/4; C.A. App. 564.[1] The KARE executive who signed Ryther for his last contract term, Janet Mason ("Mason"), was the same executive who decided not to renew Ryther's contract when it expired in 1991. After the station decided not to renew his contract, Ryther, who was 53 at the time, sued KARE 11 and its parent companies, Combined Communications Corporation and Gannett Co., Inc., alleging age discrimination, retaliation and defamation.

KARE has consistently maintained that it decided not to renew Ryther's contract because of the market research prepared by independent consultants. Market research is essential to the success of a television station. Television stations have only one commodity to sell: air time. The rates charged for commercials depend on the number of viewers watching each show. Tr. V/100-1. Television stations routinely hire independent consultants to conduct market research on the popularity of on-air personalities so the station can understand the individuals' impact on the ratings of the broadcasts, including news shows. Tr. VI/10-11; VII/110.

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[1] Throughout the petition, references to the trial transcripts will be designated with "Tr.", followed by the volume number of the transcript in roman numerals, followed by the page numbers in that volume. References to the petitioners' appendix in the court of appeals will be abbreviated with "C.A. App.", followed by the page numbers in that appendix. References to the Appendix attached to this petition will be designated by "App.", followed by the relevant page number.

Channel 11 routinely performed market research on its on-air personalities, including Ryther. Tr. V/104-21. Unfortunately, years of market research showed that Ryther did not have a positive impact on ratings for Channel 11's news broadcasts. Tr. VII/71-72, 74-75, 111-12. By 1988, the executive in charge of the newsroom, Thomas Kirby, had concluded that he would not renew Ryther's contract as the prime sports anchor for KARE because of the market research. Tr. VII/71-73. Kirby was about 51 years old when he made that decision, and Ryther testified that Kirby always treated him fairly. Tr. II/44, 48-49, 79. Ryther has never claimed that Kirby discriminated against him in any way. Kirby, however, left KARE for a new job before he could implement that decision. Tr. VII/73.

Kirby's replacement as vice president in charge of news was Mason. Although Mason discussed Ryther's contract with Kirby, she decided to renew Ryther's contract in 1988. She needed to adjust to her new role as vice president and needed to attend to other issues that she viewed as more pressing at the time. Tr. V/122-23.

As part of her job as vice president, Mason reviewed market research from 1981 on, including tracking studies up until October 1988. Tr. V/104-21. These studies showed Ryther's scores had been stagnant for many years, even though the ratings for KARE's 10 p.m. news had been getting better and better. Tr. V/119-20. In 1989, Mason commissioned additional market research to supplement the previous studies. Ryther's scores were again static, while the other KARE main anchors had growing viewer approval. Tr. II/221; V/127-28. When the station commissioned more market research again in 1990, Ryther again showed no improvement: his "recognition"

was high, but his "net impact" was lower than average. C.A. App. 96.

Independent market researchers measure the impact of an on-air personality by what is known as the "Q score." The Q score measures two related categories: (1) recognition, which is the percentage of viewers who recognize a personality; and (2) net impact, which is the percentage of viewers who have a strongly favorable opinion of the personality. Tr. VI/14-16, 19.

In addition to the quantitative scoring, market research may also involve open-ended questions asked of viewers. These open-ended questions do not affect the Q score; they give the station additional feedback from viewers. Tr. VI/90-91.

The best position for a personality is to fall into the high performer category by having Q scores that are above average for both recognition and net impact. Tr. VI/25. Personalities who are newer in the market or are less visible often fall into the "uncertain" category because their recognition and net impact are below average. Many personalities in the "uncertain" category are considered by the research firms to have potential for improving their net impact scores by increasing their recognition. Tr. VI/25. Finally, the worst category for a personality to be in is what is known as the "penalty box." In this category, a personality has above average recognition, but below average net impact. That means the personality is well known but not well liked. Tr. VI/26.

Ryther fell into the penalty box, and had been there for many years. His "Q score" had remained static for about 10 years, showing viewers knew who he was but did not have a particularly favorable reaction to him. Tr.

II/120-21. The Gallup Organization, the independent consultants who conducted the 1990 research, recommended that KARE change sportscasters. C.A. App. 136; Tr. VI/31-32, 90. Because of the cumulative evidence from many years of market research, KARE decided not to renew Ryther's contract in 1991.

The sportscaster who took over for Ryther as lead sportscaster, Jeff Passolt, had a Q score in the uncertain category, but the independent consultants concluded that Passolt's score was promising because he had not been in the market very long and showed a strong net impact given relatively low recognition. Tr. VI/19-20. By moving him to the more visible 10 p.m. news, the consultants believed Passolt had the potential to achieve the high performer category. C.A. App. 91; Tr. VI/19-21.

Significantly, Ryther never challenged the Q score results at trial; instead, he argued that management had already made up its mind about not renewing his contract before its latest market research. Ryther pointed to one fact to support this conclusion: the 1990 market research did not contain any open-ended questions about Ryther. Earlier research, however, had included open-ended questions about Ryther, Tr. V/126-27, and the testimony was clear that open-ended questions do not have any effect on the Q score. Tr. VI/90-91, 99. Moreover, as KARE argued, even if Ryther's argument were correct, it would not prove age discrimination; it would only show that KARE was influenced by the negative results of the earlier research.

Ryther claimed his Q score was low because the station did not promote sports enough. KARE pointed out that this fact, if true, proved only that the station discriminated against the sports department as a whole

and did not explain how Ryther had high recognition but below-average positive impact. Tr. VI/27-28. In addition, the independent consultants testified that promotion does not raise the positive impact of a personality who is already well known. Tr. VI/27-28. Significantly, Ryther produced no evidence that the failure to promote sports had anything to do with his age, or impacted him more than younger members of the sports department.

Four KARE executives (two of whom were members of the protected class) were involved in the decision not to renew Ryther's contract. The testimony was uncontroverted that all four based their decision on the market research. Tr. IV/136; V/104-21, 133, 198; VII/5-8; II/134-35. One of the executives, Richard Modig, who is older than Ryther and had 22 years of experience reviewing market research, testified that the need to replace Ryther was "crystal clear." Tr. VII/6. Ryther offered no evidence that any of the decisionmakers considered age as a factor in their decision.

Without evidence to contradict the Q score results, Ryther instead introduced evidence of stray remarks about age made by his own subordinates. An intern testified that two of the other sportscasters referred to Ryther as an "old man" and other similar epithets. App. 23-25. Those sportscasters were subordinates to Ryther and had no power to make decisions about Ryther's job. Ryther also failed to introduce any evidence that these comments were made in the presence of or even known to any of the people who actually decided not to renew his contract. App. 101-2.

Ryther also introduced anecdotal evidence of adverse employment actions taken against certain other individuals who were over age 40. Those individuals varied

significantly in terms of position, department and geographical location. Most significantly, none of those individuals had the same supervisor as Ryther or worked in the same department as Ryther. App. 102.

At the close of Ryther's case, the district court granted KARE's motion for a directed verdict as to Ryther's defamation claims and denied it as to his remaining claims. App. 93. The jury returned a verdict for Ryther on his age discrimination claim and on the issue of willfulness, but found in favor of KARE on the retaliation claim. App. 94. The district court denied KARE's motions for judgment as a matter of law, a new trial, or reduced damages. App. 118. Ryther was awarded damages of $1,254,535. App. 2.

1. The Jury Instruction At Issue.

The district court gave one instruction to set forth the essential elements of proof required in an age discrimination case. The court based this key instruction (Instruction 20) on Devitt & Blackmar § 106.03 (4th ed. 1987),[2] modifying the instruction slightly. The full test of Instruction 20 read as follows:

> Under federal law, it is unlawful for an employer to discriminate against an employee because of that employee's age, when the employee's age is 40 or over.
>
> In order for you to find for plaintiff, plaintiff must prove by a preponderance of the evidence that his age was a determining factor in the defendants' decision not to renew his contract.

---

[2] The same instruction is now § 106.04 in the 1996 supplement to Devitt & Blackmar.

Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.

In deciding whether Plaintiff's age was a determining factor in defendants' decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence:

First: Plaintiff was within the protected age group, that is, he was 40 years of age or over;

Second: Plaintiff's job performance was satisfactory;

Third: Plaintiff was terminated from his job when his contract was not renewed; and

Fourth: A younger person with similar credentials replaced plaintiff.

If plaintiff has failed to prove one or more of these facts, you must find for the defendants.

If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.

If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason other than age for not renewing plaintiff's contract.

Defendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination.

You should not consider whether the reason given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you may disagree with defendants' decision or believe it was harsh or unreasonable.

Instruction 20 (emphasis added). App. 32-33.

KARE objected to Instruction 20 on several grounds, most importantly that the instruction incorrectly stated plaintiff's burden of proof in an age discrimination case and permitted the jury to find discrimination upon proof of a prima facie case. Tr. VII/170-179. Defendants asked the court to include the important holding from *Hicks* that plaintiff always retains the ultimate burden of proving intentional age discrimination. Tr. VII/170. The district court denied defendants' request, saying it agreed that was the law but that putting it in the instruction "might be a little over emphasis." Tr. VII/170. Instead, the district court suggested that KARE simply argue in closing what KARE knew the law to be. Tr. VII/170, 174. The district court said the law was stated in the first two paragraphs of the instruction, and that the instruction really did not shift any burdens. Tr. VII/171.

Despite the court's belief that the jury would not believe any burden had been shifted to the defendant, the jury in fact asked a question during its deliberations which showed its confusion on exactly that point. The district court had admitted evidence about releases signed by some other former employees which released all claims against the television station, including any claims under the ADEA. The court allowed the evidence for a limited purpose on cross-examination; it was *not* admitted for the purpose of allowing the jury to infer that the station had discriminated against other employees. App. 114; Tr. of Conference Calls on Sept. 22, 1993 at 4-5. Yet the jury decided the issue was important enough to send this question to the judge:

> Is [it] common in this marketplace (i.e., Corporate America) to have employees receiving

> severance pay or early retirement to sign documents stating they will not sue for age discrimination? If you can't answer this, we will assume defense left this unanswered.

C.A. App. 590-91.

2. The District Court's Denial Of Judgment As A Matter Of Law Or A New Trial.

KARE timely moved for judgment as a matter of law under Fed. R. Civ. P. 50, arguing that no reasonable jury could conclude KARE had discriminated against Ryther because of his age, because there was no evidence that the decisionmakers acted from any age bias. The district court denied the motion. In its decision, the district court observed that this was not a case where "the employer's proffered reason is wholly without merit or obviously contrived." App. 98. To carry the burden of persuasion, the court ruled, "Ryther must do more than discredit defendants' proffered explanation." App. 98. The court acknowledged that the sufficiency of the evidence was a "close question." App. 98.

To support the denial of judgment as a matter of law, the district court catalogued evidence that the decision not to renew Ryther's contract had been made before the station's 1990 research, but failed to point to any evidence that the decisionmakers at the station had any age animus. App. 100. Instead, the district court relied on the stray remarks made by subordinates and the anecdotal evidence of individuals who had different supervisors and worked in different departments. App. 101-2.

The district court also denied KARE's motion for a new trial, bolstering its opinion that it had correctly stated the burden of proof by pointing out that it had

relied on the pattern instruction provided in Devitt & Blackmar. App. 107.

B. The Court Of Appeals' Decisions.

A divided panel of the United States Court of Appeals for the Eighth Circuit affirmed the propriety of the district court's jury instruction and denial of judgment as a matter of law. App. B. Granting a petition for rehearing en banc, the full court of appeals then considered the appeal. This resulted in another split decision, with an even split on the issue of whether the jury instruction accurately reflected the law after this Court's decision in *Hicks*.

A majority of the court (7-5) concluded that district courts in the circuit were no longer "constrained" to include any instruction on the *McDonnell Douglas* burden-shifting paradigm because of the potential for jury confusion. App. 42. They were not, however, directed to avoid such an instruction. Instead, it was left to the district court's discretion whether to give an instruction on the burden-shifting paradigm.

On the question of whether the burden-shifting instruction given by the district court here was a correct statement of the law, the en banc court was evenly divided. Six judges concluded that both Instruction 20 and the pattern jury instruction found in Devitt & Blackmar inaccurately stated the law after *Hicks*, and would be grounds for reversal in the future. App. 43. Six other judges reached the opposite conclusion that Instruction 20 and Devitt & Blackmar were correct statements of the law. App. 34. A seven-judge majority, however, ruled that the jury instruction error was harmless and did not warrant a new trial, with six judges concluding that the

instruction was correct by itself (App. 34), and a seventh judge concluding that a previously given general instruction that the plaintiff had to prove every element of his case sufficed to cure the defects in the burden-shifting instruction. App. 36.

A nine-judge majority upheld the district court's denial of judgment as a matter of law. That majority relied on the district court's recitation of the facts it believed could lead the jury to infer that age, rather than the market research and inadequate performance, was the reason for the station's decision not to renew Ryther's contract. App. 5. Three judges dissented, saying that there was not even "a hint that the testimony [of the decisionmakers] was untruthful," and focusing on the lack of evidence tying the actual decisionmakers to any evidence of discrimination on the basis of age. App. 39-40.

REASONS FOR GRANTING THE WRIT

As evidenced by the citations in the discussions which follow, the circuits are deeply divided over the proper application of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Indeed, since January of 1996 alone, no fewer than three circuits have each sat en banc on the question, with each issuing split decisions. *Compare Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), *with Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc), *petition for cert. filed*, 65 U.S.L.W. 3571 (Feb. 3, 1997), *and Ryther v. KARE 11*, ___ F.3d ___, 1997 WL 94025 (8th Cir. 1997) (en banc). This circuit division is both pervasive and persistent, and requires this Court's intervention to

resolve. This case not only squarely presents the opportunity to resolve that division, it allows the Court to do so both as the standard for application of judgment as a matter of law and as to the proper form of jury instructions, thus providing much needed clarity in both areas at the same time.

I. THE COURT OF APPEALS UPHELD AN INSTRUCTION DERIVED FROM A NATIONALLY-RECOGNIZED PATTERN JURY INSTRUCTION TREATISE WHICH MISLEADS THE JURY ON THE BURDEN OF PROOF IN DISCRIMINATION CASES AND OMITS THE MOST CRITICAL STATEMENT OF THE PROOF REQUIRED BY *HICKS*.

This Court's burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), was developed at a time when jury instructions were not an issue; jury trials were not then available in Title VII. Federal age discrimination cases, however, do involve jury trials, 29 U.S.C. § 626(c)(2), as have Title VII cases since the 1991 amendments of the Civil Rights Act. 42 U.S.C. § 1981a(c). Accordingly, district courts have long been plagued with the thorny question of how to instruct a lay jury on the proof required in a discrimination case.

If anything, this question was made more difficult by the circuit division over the application of this Court's decision in *Hicks*. In *Hicks*, of course, the Court made clear that a plaintiff must show "*both* that the reason [offered by the employer for its action] was false, *and* that discrimination was the real reason." 509 U.S. at 515 (emphasis in original). It explained that "[i]t is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519 (emphasis in original). It

also noted, however, that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination," and that "upon such rejection, '[n]o additional proof of discrimination is *required*.' " *Id.* at 511 (internal citation omitted) (emphasis in original). As discussed below, the circuits are deeply divided about whether *Hicks* permits a jury to find discrimination whenever it simply disbelieves the employer's reason for terminating a plaintiff.

This judicial confusion has exacerbated the difficulty faced by district courts attempting to instruct juries in these cases.[3] Specifically in this case, the confusion caused the district court improperly to instruct the jury. The district court was misled, at least in part, by the leading national guidebook on pattern jury instructions for federal courts, Devitt & Blackmar. All circuits routinely look to this treatise when drafting jury instructions.

Devitt & Blackmar offers a lengthy recitation of the *McDonnell Douglas* shifting burdens, but mistakenly tells the jury it can render a verdict in favor of plaintiff if plaintiff has proven its prima facie case:

> §106.04 The Essential Elements of Plaintiff's Claim – Indirect Evidence
>
> It is unlawful for an employer to discriminate against an employee because of that person's age.
>
> In order for you to find for the Plaintiff, [he] [she] must prove by a preponderance of the

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[3] The most recent issue of The Labor Lawyer, published by the American Bar Association's Section of Labor and Employment Law, underscores the need for guidance. *See* S. Grebeldinger, *Instructing the Jury In A Case Of Circumstantial Individual Disparate Treatment: Thoroughness Or Simplicity?* 12 The Labor Lawyer 399 (1997).

evidence that [his] [her] age was a determining factor in the defendant's decision to discharge [him] [her]. Plaintiff need not prove that age was the sole or exclusive motivation for defendant's discharge decision. Age is a determining factor if plaintiff would not have been discharged except for [his] [her] age.

Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of these facts.

In deciding whether the plaintiff's age was a determining factor in defendant's decision to discharge [him] [her], you should first consider whether plaintiff has established the following facts:

(Here insert the factual elements that would constitute the plaintiff's prima facie case,. . . .)

If plaintiff has proven these facts, [he] [she] has proven enough so that you may, but you need not, render a verdict in [his] [her] favor. If the plaintiff has failed to prove one or more of these facts, you must find for the defendant.

If you find that plaintiff has proven these facts and that the defendant has not produced a reason other than age for the discharge, then you must find for the plaintiff.

If on the other hand, defendant has produced evidence of a reason other than age for [his] [her] [its] actions, you must find for the defendant unless you find, considering all the evidence in the case, that plaintiff has proved that the reason given by the defendant was not the true reason for the action, or that the plaintiff's age more likely than not was a determining factor in [his] [her] discharge.

Devitt & Blackmar § 106.04 (Supp. 1996) (emphasis added).

This pattern instruction, the source of the erroneous instruction 20 in this case, misstates the burden of proof in two places. First, the instruction tells the jury it "may" find in favor of plaintiff if plaintiff simply proves the elements of a prima facie case.[4] Then, the last paragraph, the instruction says plaintiff can again prevail simply by proving that the non-discriminatory reason offered by the employer was not the "true reason," thus divorcing pretext from the ultimate issue of intentional discrimination. Half of the en banc court of appeals thought this "reversible error", App. 43; half thought it was "a correct statement of the law," App. 34.

Compounding the error in both Instruction 20 and the pattern instruction from Devitt & Blackmar is a glaring omission: neither includes the statement that plaintiff always bears the ultimate burden of proving his or her termination was the result of intentional age discrimination. In *Hicks,* this Court repeatedly pointed to this requirement as the very essence of the burden of proof in a discrimination case. *See, e.g., Hicks,* 509 U.S. at 507, 508, 511, 517, 518.

KARE objected to Instruction 20 and specifically requested that the district court include a statement on the *Hicks* requirement that plaintiff always bears the ultimate burden of proving discrimination. Tr. VII/170. although the district court agreed that KARE's proposed language correctly stated the law, the court refused to include it, saying it would "overemphas[ize]" the burden

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[4] The instruction offered by the district court in this case, set forth on p. 9-10, *supra,* revised the pattern instruction, but only magnified the error.

on plaintiff. Tr. VII/170. Instead, the district court encouraged KARE's counsel to tell the jury about that requirement during his closing argument. Tr. VII/174.

Certainly, part of the confusion caused by Devitt & Blackmar pattern instruction 106.04 and Instruction 20 in this case is the result of trying to include the *McDonnell Douglas* shifting burdens in a jury instruction in the first place. Although judges must filter evidence through these shifting burdens when deciding summary judgment motions and motions for judgment as a matter of law, the jury need only decide the ultimate issue of intentional discrimination. The circuits are split on whether courts should *ever* include this burden-shifting paradigm in a jury instruction.

For example, as noted above, the en banc Eighth Circuit here ruled, 7-5, that district court's are "not 'constrained to' instruct how discrimination can be proved," but that they may do so in the exercise of their "broad discretion in formulating instructions." App. 42.[5]

The First Circuit previously disapproved of including the burden-shifting language but now has decided it is permissible. In 1979, the First Circuit explained:

> *McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood

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[5] Previously, a panel in the Eighth Circuit had held that district courts *were* "constrained to instruct juries on the elements of the prima facie case" because a strong prima facie case combined with evidence of pretext is sufficient to raise an inference of discrimination. *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 (8th Cir. 1996).

> legalisms to decide the ultimate question of discrimination.

Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979). After eight years of working with the *McDonnell Douglas* framework, the First Circuit decided it had become comfortable enough with *McDonnell Douglas* that it could be used in a jury instruction:

> Although this framework was considered complicated and cumbersome when it was first used in *McDonnell-Douglas*, with repeated use courts have become more comfortable with it, both for their own use in ruling on Title VII claims and for the jury's use in ruling on intentional discrimination.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir. 1987). Inexplicably, the First Circuit thus assumed that the many years judges have spent working with *McDonnell Douglas* somehow translated into increased clarity for a lay jury who has most likely never before considered the concept of shifting burdens in a discrimination case.

In contrast, several circuits have instructed the lower courts to avoid the burden-shifting language of *McDonnell Douglas* because it has such capacity to mislead the jury. The Fifth Circuit, for example, has held that it is improper to instruct the jury on the elements of the prima facie case in a discrimination case. *Woodhouse v. Magnolia Hospital*, 92 F.3d 248, 257 (5th Cir. 1996). Instead, the district court should instruct the jury to consider the ultimate question of whether the defendant terminated plaintiff because of his age. *Id.*

Although not prohibiting burden-shifting instructions, the Second Circuit cautioned that burden-shifting language "is at best irrelevant, and at worst misleading to a jury." *Cabrera v. Jakabovitz*, 24 F.3d 372, 380 (2d Cir.

1994). The court had made that same point more than ten years earlier[6], but found it necessary to reiterate it after district courts continued to follow the pattern instruction laid out in Devitt & Blackmar. *Cabrera*, 24 F.3d at 380 n.4.

The Tenth Circuit likewise found burden-shifting language to be of "little relevance" to juries and advised district courts to fashion instructions that leave out technical legal distinctions. *Messina v. Kroblin Transp. Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990).

The Seventh Circuit has emphasized that the only question the jury need answer is whether the plaintiff is a victim of intentional discrimination. *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 2612 (1995). The court offered this instruction as a concise and correct statement of the law in an age discrimination case: "You must decide whether the employer would have fired the employee if the employee had been younger than 40 and everything else had remained the same." *Id.* at 344.

This Court should resolve the debate, and this case provides it with the opportunity to do so. But whether or not some instruction based on the burden-shifting paradigm is permissible, the irreducible minimum is an instruction which clearly and unequivocally states that the plaintiff has the ultimate burden of proving intentional discrimination on the basis of age. As this Court observed in *Hicks*, "[c]larity regarding the requisite elements of proof becomes all the more important when a jury must be instructed concerning them. . . . " 509 U.S. at 524. At a minimum, this must mean that any permissible burden-shifting instruction must itself make clear that,

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[6] *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 85 (2d Cir. 1983).

after all the shifting is done, the plaintiff bears the ultimate burden of proof of discrimination. In fact, once an employee offers a legitimate reason for the decision, burden-shifting instructions become irrelevant and misleading. The evidence of a prima facie case simply becomes evidence relating to the ultimate issue of discrimination and should be dealt with as any other piece of evidence.

The majority in the en banc decision compounded the error of those who thought the instruction was correct by erroneously concluding that whatever confusion or misstatements were included in Instruction 20 were cured by an earlier, boilerplate instruction on the general burden of proof.[7] Although jury instructions must be read as a whole, if the instructions suggest two or more conflicting statements of law, courts cannot presume the jury followed the proper rule. *Francis v. Franklin*, 471 U.S. 307, 322 (1985). This Court in *Franklin* pointed out that a general boilerplate instruction on burden of proof was insufficient to correct more specific instructions that were contradictory. *Id.* at 322-23 n. 8. When the jury might thus have applied the wrong criteria on a critical element of

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[7] Instruction No. 4 stated in full:

> The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendants as to that claim.

App. 34. Instruction 20, however, tells the jury that plaintiff may satisfy the burden of proving discrimination by proving the elements of a prima facie case.

the case, the error is not harmless and requires a new trial. *Id.* at 324.

This case not only presents this Court with an opportunity to clarify the confusion in the circuits, it presents a clear example of the inadequacy of any burden-shifting instruction which does not itself state where the ultimate burden lies. Here, when the jury asked the question about settlements with former employees noted above, it specifically told the court it would assume the absence of an answer to be due to a failure of proof on the part of the *defendant:* "we will assume defense left this unanswered." C.A. App 590-91.

This case is thus but the most recent and perhaps the most clear example of the need for clarification by this Court of the burden-shifting paradigm of *McDonnell Douglas* and *Hicks,* especially in the context of jury instructions. As further shown below, the courts of appeals continue to be divided on the meaning of *Hicks,* and will be until this Court takes a case such as this and provides a resolution.

II. THE COURT OF APPEALS MISAPPLIED *HICKS* BY FINDING EVIDENCE OF PRETEXT ALONE, WITHOUT ANY EVIDENCE OF AGE ANIMUS BY THE ACTUAL DECISIONMAKERS, WAS SUFFICIENT TO DENY JUDGMENT AS A MATTER OF LAW.

There is a definite, deep, and abiding split in the circuits concerning the interpretation of this Court's statement that a factfinder's disbelief of the employer's proffered reason "may together with the elements of the prima facie case, suffice to show intentional discrimination." *Hicks,* 509 U.S. at 511. The issue is one all the circuits are struggling to resolve, but are increasing the

confusion rather than reaching a consensus.[8] Three circuits in the past several months have issued en banc decisions on the issue and reached different conclusions. The other circuits are likewise divided on the issue, even to the point of contradictory panel decisions within the same circuit. The most recent en banc decision was in this case.

Here, the Eighth Circuit majority started out correctly by quoting *Hicks*, but then showed the fundamental error of its decision by going on to say, "The *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior." App. 18 (emphasis in original). That suggests that the Eighth Circuit majority, whatever it may otherwise have said, puts the "ultimate" burden of proof on the *employer*, not plaintiff, even though the district court here had already found that KARE had met its burden of offering a legitimate, nondiscriminatory reason for its decision not to renew Ryther's contract. Tr. VIII/67. The majority thus also suggests that merely calling into question the legitimacy of the employer's proffered reason can defeat judgment as a matter of law, without any evidence that age had anything to do with the employer's actual decision.

The standard used by the court of appeals majority contradicts what this Court said in *Hicks:* "We may, according to traditional practice, establish certain modes

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[8] The question is likewise pressing for practitioners in the employment discrimination area. *See, e.g.*, S. Smith, *Title VII's National Anthem: Is There A Prima Facie Case For The Prima Facie Case?* 12 The Labor Lawyer 371, 395 (1997) (arguing for an end to the burden-shifting standard of *McDonnell Douglas* and observing the need for the Supreme Court to clarify its decision in *Hicks*.)

and orders of proof,. . . . But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser finding) that the employer's explanation of its action was not believable." *Hicks*, 509 U.S. at 514-15. This is exactly what the majority did when it upheld the district court's denial of judgment as a matter of law by focusing on whether a jury could believe the decision to terminate Ryther was made before the last research was done and ignoring the fact that there was no evidence of age animus by any of the actual decisionmakers.

The majority pointed to another en banc decision, *Sheridan v. E.I. Du Pont deNemours & Co.*, 100 F.3d 1061 (3d Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3571 (Feb. 3, 1997), as support for its analysis. In *Sheridan*, the Third Circuit concluded that this Court's decision in *Hicks* allowed a plaintiff to "survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produce[s] sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reasons for the challenged employment action." *Sheridan*, 100 F.3d at 1067. The Third Circuit thus established a rule that disbelief in the employer's articulated reasons was sufficient to survive a motion for summary judgment or judgment as a matter of law, even without proof of intentional discrimination. Such a rule eviscerates the gatekeeping function assigned to courts in Fed. R. Civ. P. 50 and 56.

In contrast, another recent en banc decision reached a very different conclusion. In *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), the Fifth Circuit considered the "sufficiency of the evidence" question in light of *Hicks*

and properly required plaintiff to adduce some evidence that the employer's articulated reasons were a pretext *for discrimination* in order to uphold the jury verdict. The jury in *Rhodes* had found for plaintiff on his age discrimination case. Guiberson Oil appealed the judgment on grounds of insufficient evidence. A split panel of the Fifth Circuit reversed the judgment and found for Guiberson Oil. The Fifth Circuit reheard the case en banc "to consider the sufficiency question in light of the Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*,___U.S.___,113 S. Ct. 2742, 125 L.Ed. 2d 407 (1993)." *Rhodes*, 75 F.3d at 992.

In reviewing the entire record and recognizing generally plaintiffs' need for and reliance upon circumstantial evidence and inferences in most employment discrimination cases, the Fifth Circuit made the following determination:

> [A] plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which employee complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994.

In addition to the three recent en banc decisions, the other circuits are also in disagreement over the requirement for judgment as a matter of law after *Hicks*. All

circuits (save only the Federal Circuit) have recently tackled the issue, but the confusion continues unabated. Contradictory panel decisions within the Eleventh and Second Circuits further demonstrate just how muddy this water is.

In the Eleventh Circuit, a recent panel decision concluded that *Hicks* required additional evidence beyond disbelief of the employer's proffered reason to survive summary judgment or judgment as a matter of law. *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442 (11th Cir. 1996). Just five months later, a different panel in the Eleventh Circuit announced that *Isenbergh* was wrong. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1534 (11th Cir. 1997). In *Combs*, the court held that a plaintiff could defeat judgment as a matter of law by relying on evidence of pretext without any additional evidence that age caused the adverse employment decision. *Id.* at 1529.

Similarly, the Second Circuit has two lines of cases suggesting different interpretations of *Hicks*. *Compare Binder v. Long Island Lighting Co.*, 57 F.3d 193, 200 (2d Cir. 1995) (judgment n.o.v. was improper because evidence of pretext was enough to create inference of discrimination) *with Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81, 92 (2d Cir. 1996) (to defeat summary judgment, plaintiff must show "there is a material issue of fact as to whether (1) the employer's asserted reason for discharge is false or unworthy of belief *and* (2) more likely than not the [unlawful basis] was the real reason for the discharge"). The intra-circuit and inter-circuit splits leave district courts with no clear guidance when ruling on motions for summary judgment or judgment as a matter

of law. *See e.g., Guadagno v. Wallack Ader Levithan Associates*, 950 F. Supp. 1258, 1266 (S.D.N.Y. 1997) ("this lowly District Court finds itself . . . in the unenviable position of being confronted with a summary judgment motion that it would grant under its reading of the *Chertkova* line of cases and deny under its reading of the *Binder* line of cases").

The other circuits also remain in conflict. *Compare, e.g., Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) ("plaintiff cannot avert summary judgment if the record is devoid of adequate direct or circumstantial evidence of discriminatory animus on the part of the employer"); *Jiminez v. Mary Washington College*, 57 F. 3d 369, 377 (4th Cir.) (proving pretext is not enough for plaintiff to satisfy ultimate burden of proving plaintiff was the victim of invidious discrimination), *cert. denied*, 116 S. Ct. 380 (1995); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1083 (6th Cir. 1994) ("a plaintiff must introduce some evidence of age discrimination other than his prima facie case where there is no evidence which directly challenges the credibility of his employer's proffered explanations"); *Nidds v. Schindler Elevator Corp.*, 103 F.3d 854, 859 (9th Cir. 1996) (to survive summary judgment, "plaintiff must do more than show that the reason given was false; he must also offer some evidence that the real reason was discriminatory"); *with Kolstad v. American Dental Assoc.*, ___ F.3d___, 1997 WL 125741 at *4 (D.C. Cir. March 21, 1997) ("plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered non-discriminatory reasons"); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) ("[F]or summary judgment purposes, the non-moving party, in this case the

plaintiff, has a lesser burden. He must only 'produce evidence from which a rational factfinder could infer that the company lied.' "); *and, Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995) ("Consequently, because a jury may find illegal discrimination upon nothing more than a prima facie case and pretext, such a showing at the summary judgment stage is sufficient to get the case to the jury.") (footnote omitted).

This division over the standard for judgment as a matter of law following *Hicks* will persist unless and until this Court resolves it. The split en banc decision of the Eighth Circuit in this case presents the question squarely, on a well-developed record, with the additional opportunity simultaneously to resolve the related jury instruction problem. Petitioners respectfully submit that the time to resolve these problems is now, and that this case presents the Court with the best vehicle for doing so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: April 3, 1997

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-3622

C. Thomas Ryther, Plaintiff-Appellee, v. KARE 11, an NBC Affiliate; Gannett Co., Inc., Defendants-Appellants.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: October 22, 1996.

Filed: March 6, 1997.

Before RICHARD S. ARNOLD, Chief Judge, LAY, MCMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, *en banc*.

LAY, Circuit Judge.*

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* RICHARD S. ARNOLD, Chief Judge, McMILLIAN, WOLLMAN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, join this opinion for the Court in its entirety.

This age discrimination case comes before this court on a rehearing en banc. Our earlier panel opinion, affirming the district court's denial of a new trial and the denial of a post-verdict motion for judgment as a matter of law, appeared in 84 F.3d 1074 (8th Cir. 1996). At oral argument before the court en banc, KARE 11, which appeals from the judgment of the district court, challenged only the sufficiency of the evidence and argued that the plaintiff failed as a matter of law to make a submissible case to the jury. Because we deem this issue to be the significant claim on appeal, and in order to clarify the standard to be followed in this circuit in age discrimination cases, primarily we address that issue.

KARE 11, a Twin Cities television station, refused to renew C. Thomas Ryther's contract as lead sportscaster for a fifth three-year term. In 1991, when Ryther was terminated, he was fifty-three years old. Ryther sued KARE 11 and its parent, Gannett Co., Inc. (collectively

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FAGG, BEAM and HANSEN, Circuit Judges, join Parts I, II, and III of the Court's opinion. HANSEN, Circuit Judge, concurs in the result reached in Part IV of the Court's opinion.

FAGG, BEAM and HANSEN, Circuit Judges, have filed a separate opinion, concurring in part and dissenting in part.

LOKEN, Circuit Judge, has filed a dissenting opinion. BOWMAN and MAGILL, Circuit Judges, join this opinion in its entirety. FAGG, WOLLMAN, BEAM, HANSEN, and MURPHY, Circuit Judges, join in Part I.A. of this dissenting opinion. FAGG, BEAM, HANSEN, and MURPHY, Circuit Judges, join in Part II.A. of this dissenting opinion. FAGG, BEAM, and HANSEN, Circuit Judges, join in Part II.B. of this dissenting opinion. And FAGG and BEAM, Circuit Judges, join in Part II.C. of the dissenting opinion.

"KARE 11"), alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Following a jury verdict in Ryther's favor, the district court, the Honorable David S. Doty presiding, denied a motion for a new trial and, alternatively, a motion for judgment as a matter of law. The court entered judgment awarding Ryther $1,254,535 in back pay, front pay, liquidated damages, and attorneys' fees. *See Ryther v. KARE 11*, 864 F. Supp. 1510 (D. Minn. 1994). KARE 11 appeals. This court, acting en banc, now affirms the judgment of the district court.

I

Ryther served as a sports anchor for Channel 11 from December 1979 until July 1991, pursuant to a series of four three-year contracts. Gannett/KARE 11 purchased the station in 1983, and in 1988 Janet Mason became KARE 11's vice president of news. At that time, the sports department's members included Jeffrey Passolt and Randy Shaver, both under age forty. In the summer of 1988, Ryther was approximately fifty years of age. Ryther's responsibilities began changing that year, shortly after Mason's appointment to vice president. KARE 11 removed Ryther from Prep Sports Extra, a program he then co-anchored with Shaver, and during 1989, the year in which Linda Rios Brook became station manager, Mason removed Ryther from the six o'clock news and assigned him to a recreational segment on the five o'clock news. Passolt replaced Ryther as sports anchor during the six o'clock time slot. In May 1990, Shaver was named executive producer of sports, a position to which

Ryther was entitled under his contract. Shaver assumed many of Ryther's organizational and planning duties.

On March 6, 1991, shortly after Ryther discovered he was being excluded from promotional photos, Ryther confronted Mason about the status of his contract. Mason told him his contract would not be renewed because he had failed in the market research. After several events detailed in the district court's opinion, 864 F. Supp. at 1515-16, Ryther left KARE 11 and filed this lawsuit.

The decision not to renew Ryther's contract was made by Rios Brook, Richard Modig, Vice President of Broadcast Operations, and Mason. When Rios Brook was asked at trial what market research she relied on in making the decision about Ryther, she responded that it was the "Gallup" research, in reference to a survey conducted for KARE 11 in June 1990 by the Gallup Organization ("1990 Gallup Survey"). Tr. IV-136. Mason, similarly, said that she arrived at that decision *after* she got the 1990 Gallup Survey. Tr. V-194, V-197.

In earlier years, 1981 and 1989, the Atkinson-Farris Communications research firm ("Atkinson") performed market research to determine KARE 11's ratings. In 1990, in part because KARE 11 found the Atkinson research incomplete, KARE 11 sought new market research by commissioning the 1990 Gallup Survey. The 1990 Gallup Survey reported that Ryther had seventy-six percent viewer recognition, whereas Mark Rosen, a sportscaster at competitor WCCO, had eighty-one percent recognition. Rosen was rated number one and Ryther number two in the overall Twin Cities' market. The 1990 Gallup Survey

reported that Ryther "underperform[ed]" and that he was not a strong player for KARE 11.

KARE 11 urges that Mason, Rios Brook, and Modig made the decision not to renew Ryther's contract in August 1990, upon receipt of the 1990 Gallup Survey. The primary issue at trial was whether the overall market research was the true reason for Ryther's dismissal, or merely a pretext for age discrimination. Ryther asserts that he offered evidence to show that the market research was not the true reason for his dismissal, that in fact the decision to dismiss him was made prior to that time, and that the research was biased and merely a pretext for unlawful age discrimination.

The district court, in denying KARE 11's motion for judgment as a matter of law, carefully summarized the evidence from which a jury could reasonably find that the proffered reason for refusing to rehire Ryther masked discrimination. Judge Doty found that there was sufficient evidence for the jury reasonably to conclude that: the defendants made the decision not to renew Ryther's contract before the 1990 Gallup Survey; some of Ryther's duties had been transferred to younger people and Ryther's contract was not renewed despite positive performance evaluations from KARE 11; KARE 11 deceived Ryther by leading him to believe that his work was commendable, in order to prevent him from improving upon his alleged deficiencies; the 1990 Gallup Survey was purposely designed so that Ryther would not get a fair rating, thus masking the discriminatory reason for his termination; and KARE 11 provided a hostile work environment for Ryther because of his age. *Ryther*, 864 F. Supp. at 1715-18.

It is well settled that we will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the non-moving party. *Gardner v. Buerger*, 82 F.3d 248, 251 (8th Cir. 1996).

II

The law governing the allocation of evidentiary burdens in discrimination cases is well established. *See generally St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-12 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973). Since *Hicks*, this court has applied *Hicks*, *Burdine*, and *McDonnell Douglas* to several age discrimination cases. However, for the sake of guidance to the bar and district courts, we take this opportunity, sitting en banc, to unify and clarify our understanding of the Supreme Court's standard. The facts presented here, as in *Hicks*, fall under a standard that does not require proof of direct discrimination for the plaintiff to make a submissible case for the jury.[1]

In discrimination cases, it is now well settled that a plaintiff's presentation of a prima facie case creates a

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[1] It is imperative to recognize that under the facts submitted, this is not a reduction-in-force case, *see Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796 (8th Cir. 1994), and *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095 (8th Cir. 1996), nor a mixed-motive case, *see Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444 (8th Cir. 1993), where different rules apply.

legal presumption of unlawful discrimination. This presumption places an obligation upon the employer to produce evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. If the employer carries this burden, the *legal* presumption of unlawful discrimination "drops out of the picture." *Hicks*, 509 U.S. at 511; *accord Burdine*, 450 U.S. at 254 & n.7, 255. Once this occurs, the Supreme Court articulated the overall process:

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [the plaintiff]", [*Burdine*, 450 U.S. at 253]. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d, at 493 (emphasis added).

Hicks, 509 U.S. at 511 (footnote omitted).

Thus, according to *Hicks*, when the plaintiff's evidence of pretext challenges the defendant's articulated nondiscriminatory reason, such evidence may serve as well to support a reasonable inference that discrimination was a motivating reason for the employer's decision. As the Supreme Court has observed, "when all legitimate reasons for rejecting an applicant have been eliminated as

possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reasons, based his decision on an impermissible consideration such as [age]." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1977).

We find support from the recent en banc decision by the Third Circuit. In *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (en banc), the court set forth the same standards and interpretation of *Hicks* as we do now. Chief Judge Dolores K. Sloviter wrote:

> [W]e have understood *Hicks* to hold that the elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.[2]

Id. at 1066-67.[3]

In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer

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[2] *Sheridan* does not expressly acknowledge, as we do today, that evidence of pretext *does not always* support an inference of intentional discrimination. As we note, there may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination. *See infra* n.4 and accompanying text.

[3] The Third Circuit noted that other federal courts of appeals, including this court, have interpreted *Hicks* in a similar manner, citing cases from the D.C. Circuit, the Second Circuit, the Fourth Circuit, the Sixth Circuit, the Seventh Circuit, the Eighth Circuit, and the Ninth Circuit. *See Sheridan*, 100 F.3d at 1067-68 (citing *Shaw v. HCA Health Servs.*, 79 F.3d 99 (8th Cir. 1996) (Morris Arnold, Loken, and Beam, JJ.)).

creates a legal presumption of unlawful discrimination. The *elements* of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of the defendant's proffered explanation, they may permit the jury to find for the plaintiff. This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.[4] Furthermore, as the *Hicks* Court explained, the plaintiff

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[4] Our cases have reflected this principle. For example, in *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), the plaintiff argued that the employer's proffered reason for the termination was false by showing that the actual reason he was discharged was that he confronted his employer about the company's alleged SEC violations. *See id.* at 1337. The court affirmed summary judgment for the employer. In *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986), employees in the protected age group claimed disparate treatment. The employer asserted the nondiscriminatory reason for the disparate treatment was their lack of qualification. The employees' proof of pretext was that others *within* their age group were given privileges denied to them. The court found that this evidence of pretext did not provide a reasonable inference of age discrimination. Judge Richard S. Arnold observed:

> For even if plaintiffs were unfairly treated, and even if others were unjustly favored in the past, no inference of age discrimination can be drawn, for the simple reason that the employees who were allegedly given preferential treatment were not "young." They were in the same age group as plaintiffs. If any kind of discrimination is operating here, therefore, it is not age discrimination, and that is all this case is about.

Id. at 660.

In both *Rothmeier* and *Barber*, the evidence of pretext did not support a reasonable inference of age discrimination. The

must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon

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Seventh Circuit, sitting en banc, explained this principle in *Visser v. Packer Engineering Assoc.*, 924 F.2d 655 (1991) (en banc). Judge Posner observed:

> [T]he age discrimination law does not protect an older employee from being fired without good cause. It protects him from being fired because of his age. If the employer offers a pretext – a phony reason – for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age. This is just the test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), transposed to the age discrimination setting.
>
> . . .
>
> A pretext, in employment law, is a reason that the employer offers for the action claimed to be discriminatory and that the court disbelieves, allowing an inference that the employer is trying to conceal a discriminatory reason for his action. It is not . . . an unethical reason for action, or a mask for such a reason. If [the employee was] really fired . . . because [the employee] was a whistleblower, or because [the employee's] primary loyalty was, as it should have been, to [the company] rather than to the person of [the CEO] of the company (these are closely related points, of course), this may show that [the CEO] is a bad man. It does not show or even tend to show that [the employee] was fired because of his age. It tends if anything to show the opposite, because if [the employee] was fired because of his disloyalty to [the CEO] the natural though not inevitable inference is that he was not fired because of his age. Certainly his age had nothing to do with the direction of his loyalties.

Id. at 657 (citations omitted).

intentional discrimination.[5] 509 U.S. at 511 n.4. Obviously, in all age discrimination cases, the plaintiff must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the traditional tests of summary judgment and judgment as a matter of law. *See Rothmeier*, 85 F.3d at 1335 ("Intentional discrimination *vel non* is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not.")

III

KARE 11 does not contend that Ryther failed to establish a prima facie case of age discrimination. There exists ample evidence that the jury could reasonably believe that (1) Ryther was within the protected age group (he was fifty-three years old); (2) as manifested by his contract renewals and KARE 11's own evaluations, he had been performing his job at a satisfactory level for over twelve years; (3) his contract in 1991 was not

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[5] Thus, *Hicks* makes it clear that the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." 509 U.S. at 515. "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 519. It is equally clear, however, that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination and . . . . '[n]o additional proof of discrimination is *required*.' " *Id.* at 511 (internal citation omitted). As Justice Scalia explained, "rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination," but "there still must be a finding [by the finder of fact] of discrimination." *Id.* at 511 n.4.

renewed; and (4) KARE 11 replaced him with a younger person. (Jeff Passolt was only thirty-three years of age and did not have as high a performance rating as Ryther.)

We turn to the fundamental issue in this case: whether Ryther produced sufficient evidence to allow a jury reasonably to find that KARE 11 intentionally discriminated against him on the basis of his age. Although much of the evidence is circumstantial, we agree with the district court's careful analysis that a reasonable jury could infer that KARE 11's asserted reason for discharge was false, and that the evidence was sufficient to allow a jury to find that KARE 11 engaged in age discrimination.[6]

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[6] *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (recognizing that the "sensitive and difficult" issue of intentional discrimination will frequently be proven by circumstantial evidence of pretext, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); *id.* at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves."); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination."); *McDonnell Douglas*, 411 U.S. at 804-05 (listing various types of circumstantial evidence as relevant to showing of pretext); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 273 (1989) (O'Connor, J., concurring in judgment) (emphasis in original) (noting that "requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring [anti-discrimination law] inapplicable to such decisions"); *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 251 (8th Cir. 1995) ("An age-discrimination plaintiff may rely on either direct or circumstantial evidence to prove that he has been the victim of unlawful discrimination.").

A. The Market Research as a Whole

Ryther urges that the record is replete with evidence that his research ratings reflected not his abilities, but KARE 11's failure to emphasize sports. The plenary evidence to this effect included the testimony of Ryther that, just days before his dismissal, Paul Baldwin, KARE 11's assistant news director, told him, "[t]he research isn't your fault," and explained that Ryther's showing relative to WCCO's Mark Rosen was the result of WCCO's promotion of Rosen, its ownership of broadcast rights in several major sporting events, and its emphasis on sports generally. Other evidence showed that Ryther continued to ask for better sports promotions, but was denied. In fact, Rios Brook admitted that "[sports] was not an area that I was concerned about," and Mason testified that "sports was relatively unimportant" in comparison to other parts of the newscast. Relatedly, Gallup Vice President Dr. Frank Newport admitted that Ryther's showing might be due in part to KARE 11's poor promotion of sports and noted that Rosen's recognition was "unusual" for a sportscaster. Yet despite KARE 11's own lack of sports promotion, Ryther remained the number two sportscaster in the market, second only to Rosen, and above KARE 11's own Jeff Passolt and Randy Shaver.[7]

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[7] In addition to the evidence of poor sports promotion, the jury reasonably could have believed Ryther's evidence that KARE 11's newscast gained a following not because of its personnel, but because of its programming following and preceding the newscast. "Cheers," for example, followed the 10:00 p.m. newscast.

There can be little doubt that, although it had before it the 1981 and 1989 Atkinson research, the jury could reasonably reject KARE 11's alleged reliance upon Ryther's low market ratings on the ground that KARE 11 kept rewarding Ryther for his performance. In fact, KARE 11 negotiated with Ryther and awarded him substantial salary increases in three different *interim* three-year contracts. These contract renewals could easily justify a finding that, in this interim period, Ryther's performance was more than adequate to fulfill KARE 11's programming interests.[8]

In May 1989, Lilyan Wilder, a training consultant to KARE 11, copied a letter to Janet Mason, written to Ryther after reviewing his performance in a training session. The letter read in part:

> It was a pleasure to see you again and to work with you. *Your authority, your sense of "sports" and the essence of it, are excellent. Your timing, your play-by-play and your good, strong voice are all positive.*

Appellee's App. at E2 (emphasis added). Likewise, as late as August 1, 1990, Barry Nash, a talent coach hired by KARE 11 in 1990, wrote about Ryther to Mason and Baldwin:

> Hats off to Tom for the effort to create reports with more universal appeal. Innovations like the Three Musketeers footage he used to begin his

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[8] In 1988, Mason herself negotiated a new three-year contract with Ryther.

> piece on fencing are certainly a step in the right direction.

Id. at E5.[9]

Most significant, however, in the consideration of the conflicting evidence, notwithstanding the earlier Atkinson reports, is Mason's personal review of Ryther's performance in March 1990. She gave him the rating of "commendable," the second highest mark possible, and indicated that "his work is done quickly and accurately; total job responsibilities are met." Mason's 1990 review of Ryther also stated in part: "As anchor: knows the market & key players/contacts[;] he wants to put on a good product – open to trying new ideas. . . . As sports director – has developed good working relationship with the movers & shakers of the professional & college sports world." *With this kind of commendation written as late as March 1990, it is readily understandable how the jury could reject the prior market research of "underperformance" as the reason for Ryther's termination.*

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[9] At the same time, Nash wrote in part about Randy Shaver and Jeff Passolt, Ryther's eventual younger replacements:

> RANDY SHAVER
>
> His continued improvement is primarily a matter of content. *None of the airchecks I viewed featured work that was memorable or especially creative in any way.* It was simply competent, animated sportscasting.
>
> JEFF PASSOLT
>
> *The same criticisms apply to Jeff.* His delivery is relaxed and professional. *It is not exceptional,* primarily because none of the stuff I saw featured any especially creative content.

Id. at E6-E7 (emphasis added).

Even assuming that the "research" allegedly relied upon included *both* the Atkinson reports and the 1990 Gallup Survey, we conclude that there is sufficient evidence for a reasonable jury to find that it played little or no role in KARE 11's decision not to retain Ryther in 1991.

B. Ryther's Claims that the 1990 Gallup Survey Was Biased

Ryther testified that the 1990 Gallup Survey questions were both designed *and* interpreted to provide an incomplete picture of viewers' perceptions of his performance. He initially challenged the 1990 Gallup Survey's methods as an incomplete means of obtaining research concerning his performance.

Gallup surveyed a random sample of viewers using two methods: a "Q score technique" and open-ended questions. The Q score technique employs multiple questions to measure audience recognition and approval (particularly strong like and dislike) of the selected personalities. Ryther was among twenty-five on-air personalities included in this portion of the survey.

Open-ended questions, by contrast, allow viewers to describe identified persons in their own words, and by Gallup's description are "designed to help [stations] gain a more complete understanding of what viewers think about key personalities." For example, the 1990 Gallup Survey asked viewers, "How would you describe Jeff Passolt? What comes to mind that you particularly like or dislike about him as a newscaster?" The ten key personalities included Rosen, Passolt, and KARE 11's other lead

anchors, among others. Ryther, however, was excluded from this portion of the research.

Ryther also notes Janet Mason's admission that in advance of the research she told Gallup that one of the "important issues" about which KARE 11 sought information was "the sportscaster position." Although Mason identified Passolt and Rosen as "key personalities" for purposes of the research project, she did not so characterize Ryther. Rather, she justified the omission of open-ended questions about Ryther on the grounds that their inclusion would have made the survey "too long" and that similar questions had been asked about him in 1989 research conducted by Atkinson. Mason also admitted, however, that the 1989 Atkinson project asked such "free response" questions concerning each of the ten other "key personalities."

KARE 11 dismisses Ryther's argument that it designed the 1990 Gallup Survey in a manner unfavorable to him as an irrelevant argument that is "without foundation and intrusive of KARE's business judgment." Reply Br. at 8. KARE 11's statement not only mischaracterizes Ryther's attack on the survey, which is plainly a claim that the survey was biased, but is incorrect as a matter of law. As the Supreme Court unanimously observed in *Burdine*, the fact "that the employer misjudged the qualifications of the [plaintiff] does not *in itself* expose [the employer] to . . . liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*" 450 U.S. at 259 (emphasis added). The jury may thus consider as wholly relevant *both* whether the 1990 Gallup Survey was designed in a manner that

from the outset disfavored Ryther, *and* whether the survey was actually a sound – as opposed to pretextual – basis upon which to make employment decisions.

It remains an open question whether, standing alone, this evidence would support the jury's verdict. But we are concerned with whether the overall evidence supports a reasonable inference that age motivated KARE 11's actions. *Hicks*, 509 U.S. at 511. To that end, Ryther's attack on the survey is probative. The *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior. *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994). Yet, in the nature of things, evidence that the defendant employer says it relied on market research later shown to be inaccurate may assist the finder of fact in determining whether the employer is giving an honest explanation of its actions. *See Burdine*, 450 U.S. at 259.

As the district court held, the jury reasonably could have found KARE 11's explanations to be "trivial" and inferred that the real reason the defendants omitted Ryther from the open-ended questions was a fear that the results of the survey would undermine their age-based decision not to renew his contract. Relatedly, a reasonable jury might also infer that, if it was unwieldy or redundant to repeat such questions about Ryther, KARE 11 ought to have excluded such repetitious questions about Passolt and Rosen as well. In other words, a reasonable jury could have reasoned that, if it was redundant and costly to ask open-ended questions about Ryther, it was redundant and costly to ask open-ended questions about Rosen, Passolt, and the other eight "key personalities," all of whom were included in the 1989 Atkinson research.

That KARE 11 did not include Ryther in this portion of the 1990 Gallup Survey reasonably suggests that KARE 11 had already decided to terminate Ryther. Moreover, as the district court stated, the long delay between the research results and the time of Ryther's notice of dismissal reasonably suggests the defendants did not want to provide Ryther an opportunity to address his weaknesses, and thus supports the inference that KARE 11 had an age-based agenda to terminate Ryther. The jury had a right to believe that the survey was inadequate, biased, and in fact a subterfuge to mask KARE 11's age-based animus against Ryther.

C. Mason's Treatment of Ryther Before the Gallup Survey of 1990

In *McDonnell Douglas,* the Supreme Court observed that "evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [plaintiff] during his prior term of employment." 411 U.S. at 804. As the unanimous Court understood, evidence that the defendant treated the plaintiff, whose performance remained stable throughout the relevant period, differently upon a change in supervisors may, together with the elements of the prima facie case and evidence that the new supervisor "was out to get" him, support a reasonable inference that age motivated that difference in treatment. *Id.; see also Hicks,* 509 U.S. at 511.

The district court found sufficient evidence for the jury to conclude that Janet Mason's decision not to renew Ryther's contract was made before the 1990 Gallup Survey was commissioned. The evidence to this effect

included Ryther's testimony that: (1) between 1988 and 1990, KARE 11 transferred his duties to younger members of the sports department; (2) when Mason assumed her role as Ryther's supervisor in 1988, KARE 11's managing editor, Marie Kurken, told him to "watch [his] back" because Mason "was out to get" him, and he "was number one on her list, on her hit list, to get out of that news room"; (3) Mason treated Ryther as though he "couldn't seem to do anything right"; and (4) when Mason took over, he "went from being a valued member of the news staff sports department to almost a – in Janet Mason's eyes, as an incompetent. And incidents kept happening that underlined and verified those words of Marie Kurken. It kept happening and happening and happening, so I noted them." In addition, there was documentary and testimonial evidence that Mason, in March 1990, gave Ryther the rating of "commendable," stating that his "work is done quickly and accurately; total job responsibilities are met," but shortly thereafter, when notifying him of his dismissal, explained the decision as based on the showing of earlier research that Ryther was a "failure" in the market.

A jury might reasonably infer from Ryther's "unimproved showing" that KARE 11 felt his long-term performance justified the non-renewal of his contract. But a reasonable jury might also infer that KARE 11's continuous approval and commendable ratings of that performance belie that claim. There exists substantial evidence that, after Janet Mason became Ryther's supervisor (and before the 1990 Gallup Survey), KARE 11 determined that Ryther's contract should not be renewed. Moreover, it cannot be said that *no* reasonable jury could have rejected

as contrived Mason's explanation that she rated Ryther favorably in March 1990 out of fear that rating him unfavorably would cause him to fall apart emotionally. Such a statement may appear untruthful to reasonable sensibilities. A reasonable jury could also infer that Mason failed to notify Ryther of his alleged deficiencies for fear that he might correct them,[10] or that Mason treated Ryther as "an incompetent" because she harbored an age-based animus against him. *See Hicks*, 509 U.S. at 511. In sum, a reasonable jury could infer that Mason had made a decision to terminate Ryther before the 1990 Gallup survey was conducted.

D. Ryther Claims that KARE 11 Maintained a Pervasive Environment Unfavorable to Older Employees

The district court relied on several portions of the record in holding that Ryther's evidence of a corporate atmosphere unfavorable toward older employees could reasonably support the jury's inference that Ryther was the subject of age discrimination. KARE 11 contends this evidence is insufficient, noting that statements made by employees not involved in Ryther's non-renewal and

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[10] In this regard, Ryther's claim paralleled the proof of pretextuality the plaintiff produced in *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 802 (8th Cir. 1994):

> Because [defendant's] April 27, 1989, memo shows he had already decided that [plaintiff] should be terminated and given early retirement and because [defendant] did not in fact permit [plaintiff] to correct his work performance, the jury could reasonably infer that [defendant] was hiding a motivation to fire Nelson because of his age.

stray remarks in the workplace do not give rise to a reasonable inference of discrimination. Not only is KARE 11's reduction of this evidence to a few "stray remarks" factually incorrect, but, more importantly, such evidence *can*, if sufficient together with other evidence of pretext, support a reasonable inference of age discrimination. As the Supreme Court stated in *McDonnell Douglas*:

> Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] . . . general policy and practice with respect to [older persons'] employment. On the latter point, statistics as to [defendant's] employment policy and practice may be helpful to a determination of whether [its] refusal to rehire [plaintiff] conformed to a general pattern of discrimination against [older employees].

411 U.S. at 804-05 (footnote and citations omitted).

Although Ryther did not present his case in the form of statistical evidence, he did offer testimony suggesting KARE 11's actions "conformed to a general pattern of discrimination" against older employees. *Id.* at 805. This evidence included: Ryther's testimony that he was criticized for the bags under his eyes; Mason's testimony that she once considered allowing Ryther to wear glasses because she felt they might help cover them; testimony that several older employees were suddenly given poor performance ratings and forced to choose between early retirement and demotions; testimony that others in the sports department made cutting remarks about Ryther's age, calling him an "old fart," an "old man," and saying he was "too old to be on the air," and "had no business being in the industry any more for his age"; testimony

that Shaver and Mason had frequent discussions about Ryther; and testimony that Shaver complained about Ryther to Mason on ostensibly age-related grounds. In the latter connection, the following excerpt from the testimony of Edward Villaume, a former sports department intern, is illuminating:

Q: Did you ever hear Randy Shaver make comments about Tom's age?

A: Yes, I did.

Q: And what comments did you hear Randy make about Tom's age?

A: Randy Shaver called Tom Ryther an old man, an old fart, and said he was too old to be on the air.

Q: Did you hear Jeff Passolt make any comments about Tom's age?

A: Yes, I did.

Q: And what comments did you hear Jeff Passolt make about Tom's age?

A: That Tom was an old man. He called him too old to be on the air, couldn't figure out why Randy and himself, Jeff, were not number one, and that Tom had no business being in the industry any more for his age, called him an old fart as well.

Q: Did you hear Randy Shaver make his comments on more than one occasion?

A: Yes, I did.

Q: Approximately how many times did you hear Randy Shaver make those comments?

A: I would say approximately ten or more.

Q: Did you hear Jeff Passolt make those comments on more than one occasion?

A: Yes, I did.

Q: And approximately how many times did Jeff Passolt make those comments?

A: Somewhere around ten. Not as often as Randy.

Q: Did you ever hear Dave Levine, or Levine, make comments about Tom Ryther's age?

A: Yes, I did. Dave would often chime right in with Randy and Jeff, or would make a comment on his own about Tom's age.

* * *

Q: Had you ever heard Randy Shaver complain to Janet Mason in your presence?

A: Yes.

Q: Can you tell us about what was said on that occasion when you were present when Randy complained to Janet Mason?

A: Randy had said to Janet that Tom was never around any more, that he was on the phone, and that he just wasn't able to grasp the new computer system and couldn't handle the, kind of the newer technology.

Q: Did you ever hear any other staff members make comments about Tom's age?

A: Yes.

Q: And who was that?

A: Brian Singer, who was a camera man, had mentioned that more than once, and also had mentioned the fact that he could not understand how Tom was still in the business and why Randy and Jeff were not the number one anchor position there in the sports department.

KARE 11 argues that the statements referenced in this testimony were not those of persons responsible for the decision not to renew Ryther's contract. To the extent that these statements were made outside the presence of the decisionmakers, KARE 11 is correct that they do not, *standing alone*, raise an inference of discrimination. *Compare Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541-52 (8th Cir. 1991) (reversing denial of defendant's motion for JNOV) *with Morgan v. Arkansas Gazette*, 897 F.2d 945, 950-51 (8th Cir. 1990) (affirming denial of defendant's motion for JNOV). The evidence also reveals, however, that Shaver and Mason had frequent discussions about Ryther, and that they discussed Ryther's ability to "grasp" some of the "newer" developments at the station. Furthermore, other evidence shows that Mason was generally responsive to Shaver's ideas and demands, including his request that Ryther be taken off Prep Sports Extra. The jury could thus reasonably infer that Mason formed her judgment about Ryther on the basis of the discriminatory comments frequently made by Shaver, Passolt, Levine, and Singer, and acted on them by terminating him.

KARE 11 dismisses the testimony of three former KARE 11 employees that the station was systematically ridding itself of older employees because those

employees were dissimilarly situated and because " 'individual employees' opinions of actions taken by their employer, . . . in themselves, are insufficient to support [Ryther's] argument that his age was a determining factor in his discharge.' " Appellants' Br. at 35 (quoting *Morgan*, 897 F.2d at 950 (alteration ours)).[11] As to KARE 11's reliance on *Morgan*, we think Judge John R. Gibson's opinion for this court in *Morgan* supports our conclusion:

> Much of the testimony recited above can be described as no more than individual employees' opinions of actions taken by their employer, which, *in themselves*, are insufficient to support Morgan's argument that his age was a determining factor in his discharge. There was, however, evidence that, during Tinker's administration, *a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees developed*. As we

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[11] The district court more properly observed:

> Finally, there was evidence that defendants forced other older employees to choose between demotions or early retirement. Several of the older employees were suddenly given poor performance reviews after receiving years of superior ratings. Defendants contend that evidence concerning the older employees was not relevant because they were not on-air talent and, therefore, were not similarly situated to Ryther. Although the situations of the older employees and Ryther differ in some respects, the court finds there were enough similarities to render the evidence relevant and admissible. The court also concludes that a jury could reasonably find that defendants intentionally built poor performance cases against older employees, including Ryther.

Ryther, 864 F.Supp. at 1519.

> observed in *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988), in a similar context, "[t]his fact is certainly not conclusive evidence of age discrimination *in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome.*" *Id.* at 1058.

897 F.2d at 950-51 (emphasis added) (footnote omitted). The *Morgan* court went on to conclude that "additional threads of evidence which can be gleaned from the record," including a reference to a former employee as an "old 'fuddyduddy' [who was] not smart enough to help" his department, and one employee's "observation of a trend away from older, more experienced employees toward younger ones," "support[ed] a finding that age was a determining factor in the decision to fire" the plaintiff. *Id.* at 951. Thus, while the statements of sports department employees are not, "in themselves," sufficient to uphold the district court, those statements were relevant to the jury and, together with other evidence of pretext, such as a "trend" toward younger employees, and the elements of the prima facie case, support a reasonable inference of age discrimination.

Finally, in *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996), the Seventh Circuit, confronted with evidence of nondecisionmakers' discriminatory comments, noted that "[t]he jury could readily conclude that the statements demonstrated a pervasive attitude" of discrimination. *Id.* at 632. Thus, the court determined that "[t]he remarks are evidence, which together with the other evidence in this case could lead a jury to conclude,

by a preponderance of the evidence, that the company engaged in unlawful discrimination." *Id.*

We hold the record as a whole supports a reasonable inference that *age discrimination* motivated KARE 11's decision not to renew Ryther's contract. The plaintiff produced overwhelming evidence as to the elements of a prima facie case, and strong evidence of pretext, which, when considered with indications of age-based animus in Ryther's work environment, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination. As the experienced district judge stated, "[i]t is clear that the jury believed Ryther's evidence and did not believe defendants' proffered explanation." *Ryther*, 864 F. Supp. at 1517.

The dissent urges that the district court should have granted KARE 11's post-verdict motion for judgment as a matter of law because the evidence was insufficient to sustain the jury's findings. This opinion discusses the evidence in detail; we obviously disagree with the position of the dissent in that regard.

We are reminded of the universally adopted standard that judges must be extremely guarded in granting judgments as a matter of law after a jury verdict. As this court has often repeated, the standard to be applied is as follows:

> [T]he district court must (1) consider the evidence in the light most favorable to the prevailing party, (2) assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of

> all favorable inferences that may reasonably be drawn from the facts proved. That done, the court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from the evidence.

Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996) (quoting *TEC Floor Corp. v. Wal-Mart Stores*, 4 F.3d 599, 601 (8th Cir. 1993) (in turn quoting *Western Am., Inc. v. Aetna Casualty & Surety Co.*, 915 F.2d 1181, 1183 (8th Cir. 1990))).

This court has long held that "[i]n a jury case, where conflicting inferences reasonably can be drawn from evidence, it is the function of the jury to determine what inference shall be drawn." *Anglen v. Braniff Airways*, 237 F.2d 736, 740 (8th Cir. 1956) (citing *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946)); *see also National Molasses Co. v. Herring*, 221 F.2d 256, 259 (8th Cir. 1955) ("What frequently seems to be overlooked in cases such as this is that where inconsistent inferences reasonably may be drawn from undisputed evidentiary facts, it is for the jury, and not the court, to determine which inference shall be drawn."). This case clearly presented inconsistent inferences to the jury that KARE 11 would like to be resolved by the court. For example, KARE 11 asserts its proof destroyed the element of the prima facie case relating to Ryther's qualifications for the job. This overlooks Ryther's own proof, which enthusiastically supported his ability *and* challenged KARE 11's proof as pretextual. The credibility of this evidence was a matter exclusively for the jury to resolve. *See Ryther v. KARE 11*, 84 F.3d 1074, 1086 (8th Cir. 1996).

At the end of the day, perhaps most instructive is the United States Supreme Court's directive in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946):

> *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.* But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. (emphasis added).

This court continues to espouse the essence of *Lavender*. In 1996, upholding the district court's decision to submit a particular issue to the jury, Chief Judge Richard S. Arnold instructed, "We do not know what our answer would have been if we had been sitting on the jury, but that is not important. There was conflicting evidence on this issue, and it could have gone either way. Making decisions of this kind is exactly what juries are for." *Forbes*, 93 F.3d at 501.

IV

The dissent urges various reasons that the jury instructions were erroneous and a new trial should be granted. In order to preserve an objection for appeal, "[t]he grounds of the objection must be specifically stated, and the error claimed on appeal must be based on the same grounds stated in the objection." *Starks v. Rent-A-Center*, 58 F.3d 358, 361 (8th Cir. 1995); *see* Fed. R. Civ. P.

51. After a thorough review of the instruction conference transcript, we determine that only two objections raised in KARE 11's briefs to this court can be said to be made "on the same grounds" as its objections in the district court. First, KARE 11 argues Instruction 20 suggested to the jury that Ryther could prevail simply by establishing a prima facie case. Appellant's Br. at 45. The instruction stated that, if Ryther proved a prima facie case, "he has offered evidence from which you could conclude that defendants discriminated against him because of his age." *Ryther v. KARE 11*, Court's Instructions to the Jury, Instruction No. 20, *reprinted in Ryther v. KARE 11*, 84 F.3d 1074, 1087 n.14 (8th Cir. 1996). Second, KARE 11 argues that Instruction 20 did not make a distinction between the burden on defendants (of production) and the burden on plaintiffs (of persuasion). Appellant's Br. at 46. In other words, KARE 11 asserts, the instruction did not comport with the teaching of *Hicks*, because it did not make clear that Ryther carried the burden of establishing both pretext and discrimination by a preponderance of the evidence. Appellant's Pet. for Reh'g and Suggestion for Reh'g en banc at 9.

This court reviews both of these objections under an abuse of discretion standard, paying particular heed to the fundamental rules this court has long followed, best summarized in *Hastings v. Boston Mut. Life Ins. Co.*, 975 F.2d 506, 510 (8th Cir. 1992):

> A district court has broad discretion in instructing the jury. In conducting our review this Court reverses a judgment only if we find that, when viewed in their entirety, the jury instructions contained an error or errors that

> affected the substantial rights of the parties. *United States E.P.A. v. City of Green Forest, Arkansas*, 921 F.2d 1394, 1406 (8th Cir. 1990), *cert. denied sub nom., Work v. Tyson Foods, Inc.*, 502 U.S. 956, 112 S. Ct. 414, 116 L.Ed.2d 435 (1991). Accordingly, we will not find error in instructions simply because they are technically imperfect or are not a model of clarity. *See Federal Enterprises, Inc. v. Greyhound Leasing & Fin. Corp.*, 849 F.2d 1059, 1061 (8th Cir. 1988).

Under this standard, we must reject both of KARE 11's arguments against Instruction 20. Well settled is the rule that jury instructions must be read as a whole. *Walker v. AT&T Technologies*, 995 F.2d 846, 849 (8th Cir. 1993). Instruction 20 in full reads as follows:

> Under federal law, it is unlawful for an employer to discriminate against an employee because of that employee's age, when the employee's age is 40 or over.
>
> In order for you to find for plaintiff, plaintiff must prove by a preponderance of the evidence that his age was a determining factor in the defendants' decision not to renew his contract.
>
> Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.
>
> In deciding whether Plaintiff's age was a determining factor in defendants' decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence:
>
> First: Plaintiff was within the protected age group, that is, he was 40 years of age or over;

> Second: Plaintiff's job performance was satisfactory;
>
> Third: Plaintiff was terminated from his job when his contract was not renewed; and
>
> Fourth: A younger person with similar credentials replaced plaintiff.
>
> If plaintiff has failed to prove one or more of these facts, you must find for the defendants.
>
> If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.
>
> If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason other than age for not renewing plaintiff's contract.
>
> Defendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination.
>
> You should not consider whether the reasons given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you may disagree with defendants' decision or believe it was harsh or unreasonable.

A reading of this instruction in its entirety makes it clear that KARE 11's first argument must fail. KARE 11's objection seeks to isolate the sentence on the prima facie case from the preceding and following sentences. For jurors to believe Ryther could have prevailed by establishing only

a prima facie case, they would have had to *stop reading* after the complained-of sentence. *See Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 501 (8th Cir. 1996) ("We have great faith in juries, and their desire and ability to follow instructions and make distinctions among the various issues put before them.").

KARE 11's second argument must fail as well. First, Instruction 20 twice states Ryther's burden to prove age discrimination. In addition, Instruction 4 further clarified Ryther's burden:

> The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendants as to that claim.

Ryther v. KARE 11, Court's Instructions to the Jury, Instruction No. 4. While we believe Instruction 20 standing alone is a correct statement of the law, it is buttressed by this directive in Instruction 4. In addition, Judge Doty pointed out that KARE 11 was free to argue, as it did, that Ryther's failure to carry its burden of proof as to any element of the case required the jury to return a verdict for the defendant. Neither of KARE 11's arguments convince the court Judge Doty abused his discretion in giving Instruction 20.

Any other objection to this instruction has been waived because KARE 11 failed to make it at the instruction conference and argue it on appeal. *See* Tr. VII-167-79. Objections that have been waived are reviewed by this court for plain error, which is "narrow and confined to

the exceptional case where error has seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Des Moines Bd. of Water Works Trustees v. Alvord*, 706 F.2d 820, 824 (8th Cir. 1983) (citations omitted). No serious argument can be made that this standard is met here.

Finally, in the instruction conference and in its briefs to this court, KARE 11 asserts the district court denied certain requested instructions. Grant of these requests by this court would invade the province of the district court. "The trial court has a great deal of discretion in framing the jury instructions and the court need not give the exact language desired by the parties." *Campbell v. Vinjamuri*, 19 F.3d 1274, 1277 (8th Cir. 1994). In addition, Fed. R. Civ. P. 51 requires that once a request is denied, a party in order to preserve error on appeal must specifically object as to the omission of any request. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection."). KARE 11 did not preserve any objection as to any of its denied requests. Judge Doty's decision to give Instruction 20 to the jury over other language offered by KARE 11 was not an abuse of his discretion, and does not warrant a new trial.

CONCLUSION

On the basis of the overall record and briefs, we hold there exists substantial evidence in the record to support the jury's finding of intentional age discrimination. In

addition, we find no prejudicial error in the instructions and hold that the trial court did not err in denying the motion for new trial. On this basis, we find that the judgment should be affirmed.

JUDGMENT AFFIRMED.

FAGG, BEAM, and HANSEN, Circuit Judges, concurring in part and dissenting in part.

Judges FAGG, BEAM, and HANSEN concur in Parts I, II, and III of the court's opinion. We also concur in Part I.A. of the dissent because we feel this Part makes clear that in keeping with the traditional sufficiency of the evidence analysis, an employment discrimination plaintiff must present evidence sufficient to create a reasonable inference of discriminatory intent to avoid judgment as a matter of law.

Instead of joining Part IV of the court's opinion, we join in Parts II.A. and II.B. of the dissenting opinion. We concur with the dissent's view that neither Instruction 20 from this case nor the instruction found in Section 106.04 of Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions,* should be used by the district courts. Judges Fagg and Beam also join in Part II.C. of the dissenting opinion, and thus dissent from Part IV of the court's opinion. Believing that when the instructions are read as a whole the internal inconsistency in Instruction 20 does not require reversal in this case, Judge Hansen concurs in the result reached in Part IV of the court's opinion.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. This appeal raises two important issues in applying *St. Mary's Honor Center v. Hicks,*

509 U.S. 502 (1993): first, what is the proper standard for granting judgment as a matter of law (JAML) under *Hicks*; and second, whether jury instructions frequently given in ADEA cases, including this one, are inappropriate after *Hicks*. Though I agree with the court's JAML standard, I conclude that KARE 11 is entitled to JAML on the facts of this case, and I further conclude that the district court's jury instructions were reversible error under *Hicks*. Accordingly, I would reverse. A majority of the active circuit judges join in Part I.A., which is a partial separate concurrence, and in Parts II.A and II.B. of this opinion.

I. JAML Issues.

A. The Proper Standard.

Hicks resolved a conflict among the circuits by holding that a finding of pretext does not *compel* a finding that the employer was guilty of intentional age discrimination.[12] Focusing on the passage in *Hicks* quoted at page 7 and again in footnote 5 of the court's opinion, some circuits have concluded, erroneously in my view, that submissible evidence of pretext will *always* defeat an employer's motion for summary judgment or JAML. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (en banc). Other circuits disagree. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.

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[12] In *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307, 1310 (1996), the Court noted that it has never held that the *McDonnell Douglas* paradigm applies to ADEA cases. But the Court continues to use that analysis in age cases, and so do we. *See Roxas v. Presentation College*, 90 F.3d 310, 315 (8th Cir. 1996).

1996) (en banc). Panel opinions of this court have consistently held that the district court may grant summary judgment or JAML for the employer even if plaintiff has some evidence of pretext if that evidence, for one reason or another, falls short of proving intentional discrimination. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996), succinctly stated this rule: "Intentional discrimination *vel non* is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not."

The Supreme Court concluded its opinion in *Hicks* by stating that we should not "treat discrimination differently from other ultimate questions of fact." 509 U.S. at 524, quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983). That is direct support for the rule in *Rothmeier*, because a factfinder's finding of intentional discrimination is subject to meaningful judicial review. *See Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); Fed. R. Civ. P. 50(a)(1), 52(a). Though an implausible interpretation of the passage quoted on page 7 of the court's opinion could support a contrary view, the Court in *Hicks* explicitly warned us not "to dissect the sentences of the United States Reports as though they were the United States Code." 509 U.S. at 515.

The final paragraph of Part II of the court's opinion confirms that *Rothmeier* is the law of this circuit. In Part III of its opinion, the court then properly reviews Ryther's pretext and other evidence in great detail before concluding, "there exists substantial evidence in the record to support the jury's finding of intentional age discrimination." *Supra*, at 36. Though I disagree with the

result the court reaches in this case, I concur in the legal standard it has adopted and applied.[13]

B. Applying the Standard in This Case.

My prior panel dissent discussed at length why I would hold that the district court erred in denying KARE 11's motion for JAML. *See Ryther v. KARE 11*, 84 F.3d 1074, 1090-92 (8th Cir. 1996). To summarize briefly, ten years of professional market research suggested that Ryther as lead sportscaster did not attract Twin Cities viewers. In 1988 and 1989, the station brought in two new managers, Janet Mason and Linda Rios Brooks, who retained a different market research organization to survey Twin Cities viewers. When Gallup reported that Ryther had again fared poorly, Mason, Brooks, and the third decisionmaker, Richard Modig, made the rational decision not to rehire Ryther when his fourth three-year employment contract expired.

At trial, all three decisionmakers testified that their decision was based upon the market research. There is no "suspicion of mendacity" here, not even a hint that this testimony was untruthful. Instead, the district court and

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[13] To summarize, under this standard, while plaintiff may rely on the same evidence to prove both pretext and discrimination, that evidence must be sufficient to prove that the employer is guilty of intentional discrimination. Therefore, a trial judge may decide on a motion for summary judgment or JAML that the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination, even if plaintiff has presented some evidence of pretext. We review rulings on such motions under our traditional summary judgment and JAML standards.

this court labor mightily to demonstrate that the reason is not credible because Ryther was out of favor before the Gallup survey began (a true red herring), and because the market research was flawed. But evidence of an unsound decision is not probative of intentional age discrimination. To prove intentional discrimination, pretext evidence "must call into question the veracity of the defendant's ultimate justification." *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 444 (11th Cir. 1996). *See also Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1092-94 (1st Cir. 1995); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994) (plaintiff must "produce evidence from which a rational factfinder could infer that the company lied"). Here, Ryther's weak prima facie case and unconvincing pretext evidence are insufficient for any reasonable factfinder to conclude that Ryther's age was a determining factor in KARE 11's refusal to renew his contract.

II. Instructional Error.

A.

Though jury instructions were not at issue in *Hicks*, the decision provides guidance on a troublesome instruction issue. The issue, broadly stated, is whether to involve the jury in the *McDonnell Douglas* paradigm that dominates judges' review of the evidence in employment discrimination cases. *Hicks* clearly signals that the answer in most cases is no. If the employer has articulated a legitimate nondiscriminatory reason for its challenged adverse action:

> [t]he defendant's 'production' (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his [age].

509 U.S. at 511 (quoting *Burdine*, 450 U.S. at 253). In other words, the jury need not make findings regarding the plaintiff's prima facie case or whether the employer's explanation is pretextual. Though judges when deciding summary judgment and JAML motions must filter evidence through the *McDonnell Douglas* paradigm, the jury need only decide the ultimate issue of intentional age discrimination.[14]

Since *Hicks*, other circuits have held that instructions should normally be limited to the ultimate discrimination issue. *See Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 257 (5th Cir. 1996) ("it is improper to instruct the jury on the elements of the prima facie case"); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) ("the *only* question the jury need answer – is whether the plaintiff is a victim of intentional discrimination"), *cert. denied*, 115 S.Ct. 2612 (1995). But in *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 (8th Cir. 1996), our panel concluded that "the district courts in this circuit are constrained to instruct juries on the elements of the prima facie case" because a strong

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[14] Conversely, in the rare case when the employer has not articulated a legitimate nondiscriminatory reason, the jury must decide any disputed elements of the prima facie case and is instructed to render a verdict for plaintiff if those elements are proved. 509 U.S. at 509-10 & n.3.

prima facie case plus evidence of pretext may be sufficient to infer intentional discrimination. I disagree with that conclusion. The instructions *must* tell the jury to resolve the ultimate issue of intentional discrimination. Beyond that, although the district court has broad discretion in formulating instructions, it is not "constrained to" instruct how discrimination can be proved – that is the task of attorneys in closing argument.[15]

B.

Since *Hicks*, one frequently used instruction treatise has proposed an instruction that is flatly contrary to *Hicks*. The proposal in Devitt, Blackmar & Wolff, *Federal Jury Practice & Instructions* § 106.04 (1996 supp.), first instructs the jury to consider the elements of plaintiff's prima facie case and states that, if plaintiff has proved a prima facie case, "you may, but you need not, render a verdict" for plaintiff. Under *Hicks*, that portion of the instruction, standing alone, is clear error. Section 106.04 goes on to instruct that, if defendant has produced evidence of a reason other than age, "you must find for the defendant unless you find . . . that plaintiff has proved that the reason given by the defendant was not the true reason for the action." That instruction, which divorces

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[15] We have previously observed that instructions incorporating the *McDonnell Douglas* paradigm "add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination." *Grebin v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 779 F.2d 18, 20 (8th Cir. 1985) (quotation omitted).

pretext from the ultimate issue of intentional discrimination, is squarely contrary to the *holding* in *Hicks*. In my view, use of § 106.04 in future cases will be reversible error.

In this case, the district court based its Instruction 20 on the misguided Devitt, Blackmar & Wolff format. In first instructing the jury to find whether Ryther proved the elements of a prima facie case, the court modified the comparable language in § 106.04, but if anything it magnified the clear error:

> In deciding whether plaintiff's age was a determining factor in defendants' decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence:
>
> First: Plaintiff was within the protected age group, that is, he was 40 years of age or over;
>
> Second: Plaintiff's job performance was satisfactory;
>
> Third: Plaintiff was terminated from his job when his contract was not renewed; and
>
> Fourth: A younger person with similar credentials replaced plaintiff.
>
> If plaintiff has failed to prove one or more of these facts, you must find for the defendants. *If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.*

(Emphasis added.) In other words, the court instructed that the jury could find for Ryther if he proved the elements of a prima facie case. That is wrong under *Hicks*,

and the error is clearly prejudicial because "the burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. KARE 11 preserved the issue by objecting to this aspect of Instruction 20 and proposing alternative instructions.

C.

We review jury instructions to determine whether as a whole they adequately and sufficiently state the applicable law. In an ADEA case, the main issue is whether, "[r]eading the instructions as a whole, it is evident that the jury's consideration was directed to whether age was the determining factor in [the employer's adverse action]." *Slathar v. Sather Trucking Corp.*, 78 F.3d 415, 418 (8th Cir.), *cert. denied*, 117 S. Ct. 179 (1996).

Here, Instruction 20 contains a clear error of law in the middle of a lengthy, complex instruction. (The entire Instruction 20 is quoted at pages 32-33 of the court's opinion.) No other instruction dealt with this issue, so any "cure" must be found in the remainder of Instruction 20. Following the above-highlighted error, the jury was told:

> If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason other than age for not renewing plaintiff's contract.
>
> Defendants have offered evidence of legitimate, nondiscriminatory reasons for their actions, therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered

> by defendants are merely a pretext or cover-up for intentional age discrimination.

Standing alone, this portion of the instruction was permissible (though as I have explained, ill-advised). The question is, did it cure the prior error. In *Smalley v. Duluth, W. & Pac. Ry.*, 940 F.2d 296, 298 (8th Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992), we faced this exact issue and reversed, based upon "the general proposition that if two or more conflicting statements of law are suggested, it cannot be presumed that the jury followed the proper rule." In my view, *Smalley* was correctly decided and is controlling here.

The jury was erroneously instructed that it could find for Ryther if he proved the elements of a prima facie case. It was later instructed that Ryther must prove pretext for intentional discrimination. The earlier error was not explicitly corrected, and the relationship between the two conflicting instructions was not explained. As the prima facie case is easy to prove, the first instruction invited the jury to render a verdict for Ryther if it concluded KARE 11 had treated him unfairly. The second instruction limited the jury to its proper role under ADEA. Because the issue is critical to the scope of the federal statute, because the evidence of intentional age discrimination in this case was weak at best, and because we cannot know which instruction the jury obeyed, KARE 11 is entitled to a new trial.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-3622.

C. Thomas Ryther, Plaintiff-Appellee, v. KARE 11, an NBC Affiliate; Gannett Co., Inc., Defendants-Appellants.	* * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: June 15, 1995.

Filed: May 31, 1996.

Before LOKEN and LAY, Circuit Judges, and VAN SICKLE,* District Judge.

LAY, Circuit Judge.

KARE 11, a Twin Cities television station, refused to renew C. Thomas Ryther's contract as lead sportscaster

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* The HONORABLE BRUCE M. VAN SICKLE, United States District Judge for the District of North Dakota, sitting by designation.

for a fifth three-year term. In 1991, when Ryther was terminated, he was fifty-three years old. Ryther sued KARE 11 and its parent, Gannett Co., Inc. (collectively "KARE 11"), alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. Following a jury verdict in Ryther's favor, the district court, the Honorable David S. Doty presiding, denied a motion for a new trial and, alternatively, a motion for judgment as a matter of law. The court entered judgment awarding Ryther $1,254,535 in back pay, front pay, liquidated damages, and attorneys' fees. *See Ryther v. KARE 11*, 864 F. Supp. 1510 (D. Minn. 1994). KARE 11 appeals. We affirm the judgment of the district court.

I

Ryther served as a sports anchor for Channel 11 from December 1979 until July 1991, pursuant to a series of four three-year contracts. Gannett/KARE 11 purchased the station in 1983, and in 1988 Janet Mason became KARE 11's vice president of news. At that time, the sports department's members included Jeffrey Passolt and Randy Shaver, both under age 40. Ryther then appeared on the six o'clock and ten o'clock news and hosted a weekly show, "Prep Sports Extra," during the football season. Passolt did a sports feature on the five o'clock news and, along with Shaver, served as weekend sports anchor.

In the summer of 1988, Ryther was approximately fifty years of age. Ryther's responsibilities began changing that year, shortly after Mason's appointment to vice president. KARE 11 removed Ryther from Prep Sports

Extra, which he then co-anchored with Shaver, and during 1989, the year in which Linda Rios Brook became station manager, Mason removed Ryther from the six o'clock news and assigned him to a recreational segment on the five o'clock news. Passolt replaced Ryther as sports anchor during the six o'clock time slot. In May 1990, Shaver was named executive producer of sports, a position to which Ryther was entitled under his contract. Shaver assumed many of Ryther's organizational and planning duties.

On March 6, 1991, shortly after Ryther discovered he was being excluded from promotional photos, Ryther confronted Mason about the status of his contract. Mason told him his contract would not be renewed because he had failed in the market research. After several events detailed in the district court's opinion, *Ryther*, 864 F. Supp. at 1515-16, Ryther left KARE 11 and filed this lawsuit.

The decision not to renew Ryther's contract was made by Rios Brook, Richard Modig, Vice President of Broadcast Operations, and Mason. When Rios Brook was asked at trial what market research she "relied on" in making the decision about Ryther, she responded that it was the "Gallup" research, in reference to a survey conducted for KARE 11 in June 1990 by the Gallup Organization ("1990 Gallup Survey"). Tr. IV-136. Mason, similarly, said that she arrived at that decision *after* she got the 1990 Gallup Survey. Tr. V-194, V-197.

In earlier years, 1981 and 1989, there had been other market research, performed by the Atkinson-Farris Communications research firm ("Atkinson"), to determine

KARE 11's ratings. In 1981, the Atkinson research found that Ryther was "not impressive" and that his quality score was "extremely low." In 1989, Atkinson again did a survey for KARE 11 and found sports "the softest part of your team." Ryther had "virtually the same ratings" as he had in 1981.

In 1990, partially because KARE 11 found the Atkinson research incomplete, KARE 11 sought new market research by commissioning the 1990 Gallup Survey. The 1990 Gallup Survey reported that Ryther had seventy-six percent viewer recognition, whereas Mark Rosen, a sportscaster at competitor WCCO, had eighty-one percent recognition. Rosen was rated number one and Ryther number two in the overall Twin Cities' market. The 1990 Gallup Survey reported that Ryther "underperform[ed]" and that he was not a strong player for KARE 11.[1]

KARE 11 urges that, upon receipt of the 1990 Gallup Survey, Mason, Rios Brook, and Richard Modig, KARE 11's vice president of operations, made the decision not to renew Ryther's contract in August 1990. The primary issue at trial, and also on this appeal, is whether the overall market research was the true reason for Ryther's

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[1] Underperformance of any employee may serve as a proper and nondiscriminatory reason for discharge *or* for nonrenewal of an employment contract. If an employer's decision *is* made on objective, reliable market surveys, it is clearly a policy decision belonging exclusively to the employer. However, if the stated reason is shown by substantial evidence to be pretextual, which is what the present case concerns, then, depending on the overall evidence, the jury may be permitted to consider whether the employer's stated reason is the actual reason for the employer's action.

dismissal, or merely a pretext for age discrimination. Ryther asserts that he offered evidence to show that this was not true, that in fact the decision was made prior to that time, and that the research was biased and merely a pretext for unlawful age discrimination.

The district court, in overruling KARE 11's motion for judgment as a matter of law, carefully summarized the evidence from which a jury could reasonably find that the alleged nondiscriminatory reason for refusing to rehire Ryther was false. In this regard, Judge Doty found that there was sufficient evidence for the jury reasonably to conclude that: the defendants made the decision not to renew Ryther's contract before the 1990 Gallup Survey was undertaken; some of Ryther's duties had been transferred to younger people and that his contract was not renewed despite positive performance evaluations from KARE 11; KARE 11 deceived Ryther by leading him to believe that his work was commendable, in order to prevent him from improving upon his alleged deficiencies; the 1990 Gallup Survey was purposely designed so that Ryther would not get a fair rating, thus masking the discriminatory reason for his termination; and KARE 11 provided a hostile work environment for Ryther because of his age. *Ryther,* 864 F. Supp. at 1715-18.[2]

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[2] The dissent urges that, since there is no dispute as to the existence of the market research showing Ryther's static performance, KARE 11's reliance upon it is a complete defense to Ryther's case. We respectfully submit that this is faulty reasoning; it avoids the issue of pretext. The issue is not whether the research is undisputed, but whether KARE 11's reliance upon it as a reason for Ryther's termination was pretextual, which in turn depends upon whether Ryther has produced

Our standard of review of this evidence is governed by settled rule:

> [W]e must consider the evidence in the light most favorable to [Ryther], assume all conflicts in the evidence were resolved by the jury in [Ryther's] favor, and give [Ryther] the benefit of all favorable inferences that may reasonably be drawn from the proven facts. A judgment [as a matter of law] should be granted only when all the evidence points one way and is susceptible of no reasonable inferences sustaining [Ryther's] position.

Frieze v. Boatmen's Bank, 950 F.2d 538, 540 (8th Cir. 1991) (internal citations and quotations omitted).[3]

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sufficient evidence from which a jury could reasonably find that the market research was not the real reason KARE 11 refused to hire Ryther for another contractual term as Sports Director. It is important to emphasize that we do not hold that this is what KARE 11 did; our inquiry is only to determine whether reasonable men and women of a jury had before them substantial evidence which would allow them to reject the reason KARE 11 offered, *i.e.*, market research, as one masking age discrimination. The factfinder must then determine from all of the evidence that the real reason was intentional discrimination.

[3] It merits emphasis that it is for the jury to draw the inferences from the overall evidence, not judges of this court. This is especially true where conflicting inferences may be drawn from the overall evidence. Only where there is not substantial evidence, that is, no reasonable evidence existing to show pretextuality as to the reason given by the employer, may the trial court or this court find as a matter of law that the employer's proffered non-discriminatory reason was not rebutted. *See, e.g., Nelson v. J.C. Penney*, 75 F.3d 345, 345-46 (8th Cir.), *reh'g en banc denied*, 79 F.3d 84 (1996). For example, if a

Stated another way, it is well settled that we will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, no reasonable juror could have returned a verdict for the non-moving party. *Gardner v. Buerger*, No. 95-2635EM, 1996 WL 203066, at *2 (8th Cir. April 29, 1996).

II

The law governing the allocation of evidentiary burdens in age discrimination cases like this one is well established. *See generally St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 & n.4 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-06 (1973).[4]

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plaintiff claimed that the reason for discharge was pretextual by showing there were reasons other than age, such evidence of pretext would not, as a matter of law, be sufficient evidence of pretext masking age-based animus.

[4] The plaintiff's presentation of a prima facie case creates a legal presumption of unlawful age discrimination. *Burdine*, 450 U.S. at 254 & n.7. This presumption places an obligation upon the employer (in order to avoid a judgment against it as a matter of law) to produce evidence of a legitimate, nondiscriminatory reason for the plaintiff's discharge. *Id.* If the employer carries this burden, the *legal* presumption of unlawful age discrimination "drops out of the picture," and the plaintiff is no longer entitled to judgment as a matter of law. *Hicks*, 113 S. Ct. at 2749; *Burdine*, 450 U.S. at 255. At this point, the plaintiff, who at all times retains the burden of persuading the factfinder that he was the subject of intentional discrimination, may still succeed in proving his or her case, in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

KARE 11 does not contend that Ryther failed to establish a prima facie case of age discrimination. There exists ample evidence that the jury could reasonably believe that (1) Ryther was within the protected age group (he was fifty-three years old); (2) as manifested by his contract renewals and KARE 11's own evaluations, he

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employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The Supreme Court clarified this stage of the litigation in *Hicks:*

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his [age], [*Burdine*, 450 U.S. at 253]. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*," 970 F.2d at 493 (emphasis added).

113 S. Ct. at 2749 (footnote omitted). Although the prima facie case, at this point, no longer creates a legal presumption of unlawful discrimination, the *elements* of the prima facie case, if accompanied by evidence of pretext and disbelief of defendant's proffered explanation, permit the jury to find for the plaintiff. *Id.* This is not to say that, for the plaintiff to succeed, simply proving pretext is enough. As the *Hicks* Court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination. *Id.* at 2749 n.4.

had been performing his job at a satisfactory level for over twelve years; (3) his contract in 1991 was not renewed;[5] and (4) KARE 11 replaced him with a younger person. (Jeff Passolt was only thirty-three years of age and did not have as high of a performance rating as Ryther.)

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[5] The dissent urges (without citation of authority) that there is a fundamental error (affecting the jury instructions and the elements of the prima facie case) in the district court's failure to highlight that Ryther was not terminated by KARE 11, but rather was not rehired as an employee whose fixed-term contract had expired. We are totally unaware of any legal difference in evaluating either situation in an employment discrimination case. The jury was certainly apprised of the facts of the case, and clearly understood that the issue involved, the claim of age discrimination, arose from KARE 11's refusal to renew Ryther's contract. The uniform instructions suggested for use by federal courts refer to the terms discharge, refusal to hire, refusal to renew contract, etc., as interchangeable. *See* 3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions: Civil* § 106.03 (4th Ed. Supp. 1995). The same is true of the *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit* § 5.11 (1995). The ADEA uses the terms interchangeably, specifically providing:

> It shall be unlawful for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . .

29 U.S.C. § 623(a). In short, the two are generally equated. *See also Lee v. Rapid City Area Sch. Dist.*, 981 F.2d 316, 325 (8th Cir. 1992) (en banc) (Loken, J., dissenting) ("Lee was discharged (nonrenewed), ... ").

The dissent urges that, once KARE 11 articulated a non-discriminatory reason for its actions, it was entitled to a judgment as a matter of law because it destroyed plaintiff's prima facie case. The articulation of a non-discriminatory reason by the employer destroys the *legal* presumption of plaintiff's prima facie case, and plaintiff is therefore no longer entitled to a judgment as a matter of law. *Hicks*, 113 S. Ct. at 2749. However, as *Hicks* and *Burdine* make clear, if the employee can demonstrate that the reason given for the employer's action is pretextual, then the case moves to a new level of factual inquiry. *Id.* at 2752 (citing *Burdine*, 450 U.S. at 255). Under these circumstances, *assuming that there exists credible and substantial evidence of pretext*, the plaintiff may still rely upon the *elements* of the prima facie case and the substantial evidence of pretextuality to urge to the trier of fact that the employer was guilty of intentional discrimination. *Id.* There is no synergistic formula to determine whether the elements of a prima facie case and pretext are sufficient to allow a jury to make a finding of intentional discrimination; we simply inquire whether there is substantial evidence which would allow a finder of fact to determine that the employer's reasons were a subterfuge or mask to conceal age-based animus.

With this in mind, we again turn to the fundamental issue in this case: whether Ryther produced sufficient evidence to allow a jury reasonably to find that KARE 11 intentionally discriminated against him on the basis of his age. Although much of the evidence is circumstantial, we agree with the district court's careful analysis that a reasonable jury could infer that KARE 11's asserted reason for discharge was false, and that the evidence was

sufficient to allow a jury to find that KARE 11 engaged in age discrimination.[6]

III

A. The Market Research as a Whole

Ryther urges that the record is replete with evidence that his research ratings reflected not his abilities, but KARE 11's failure to emphasize sports. The plenary evidence to this effect included the testimony of Ryther that, just days before his dismissal, Paul Baldwin, KARE 11's

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[6] *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("sensitive and difficult" issue of intentional discrimination will frequently be proven by circumstantial evidence of pretext, as "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes"); *id.* at 714 n.3 ("As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves."); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) ("[T]he *McDonnell Douglas* formula does not require direct proof of discrimination."); *McDonnell Douglas*, 411 U.S. at 804-05 (listing various types of circumstantial evidence as relevant to showing of pretext); *Hicks*, 113 S. Ct. at 2762 (1993) (Souter, J., dissenting) (describing "indirect proof" as "crucial" because "employers who discriminate are not likely to announce their discriminatory motive"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 273 (1989) (O'Connor, J., concurring in judgment) (emphasis in original) (noting that "requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring [anti-discrimination law] inapplicable to such decisions"); *Nitschke v. McDonnell Douglas Corp.*, 68 F.3d 249, 251 (8th Cir. 1995) ("An age-discrimination plaintiff may rely on either direct or circumstantial evidence to prove that he has been the victim of unlawful discrimination.").

assistant news director, told him, "[t]he research isn't your fault," and explained that Ryther's showing relative to WCCO's Mark Rosen was the result of WCCO's promotion of Rosen, its ownership of broadcast rights in several major sporting events, and its emphasis on sports generally. Other evidence showed that Ryther continued to ask for better sports promotions, but was denied. In fact, Rios Brook admitted that "[sports] was not an area that I was concerned about," and Mason testified that "sports was relatively unimportant" in comparison to other parts of the newscast. Relatedly, Gallup Vice President Dr. Frank Newport admitted that Ryther's showing might be due in part to KARE 11's poor promotion of sports and noted that Rosen's recognition was "unusual" for a sportscaster. Yet despite KARE 11's own lack of sports promotion, Ryther remained the number two sportscaster in the market, second only to Rosen, and above KARE 11's own Jeff Passolt and Randy Shaver.[7]

There can be little doubt that, although it had before it the 1981 and 1989 Atkinson research, the jury could reasonably reject KARE 11's alleged reliance upon Ryther's low market ratings on the ground that KARE 11 kept rewarding Ryther for his performance. In fact, KARE 11 negotiated and awarded Ryther with substantial salary increases in three different *interim* three-year contracts. These contract renewals could easily justify a finding

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[7] In addition to the evidence of poor sports promotion, the jury reasonably could have believed Ryther's evidence that KARE 11's newscast gained a following not because of its personnel, but because of its programming following and preceding the newscast. "Cheers," for example, followed the 10:00 p.m. newscast.

that, in this interim time period, Ryther's performance was more than adequate to fulfill KARE 11's programming interests.[8]

In May 1989, Lilyan Wilder, a training consultant to KARE 11, copied a letter to Janet Mason, written to Ryther after reviewing his performance in a training session. The letter read in part:

> It was a pleasure to see you again and to work with you. *Your authority, your sense of "sports" and the essence of it, are excellent. Your timing, your play-by-play and your good, strong voice are all positive.*

Appellee's App. at E2 (emphasis added). Likewise, as late as August 1, 1990, Barry Nash, a talent coach hired by KARE 11 in 1990, wrote about Ryther to Mason and Baldwin:

> Hats off to Tom for the effort to create reports with more universal appeal. Innovations like the Three Musketeers footage he used to begin his piece on fencing are certainly a step in the right direction.

Id. at E5.[9]

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[8] In 1988, Mason herself negotiated a new three-year contract with Ryther.

[9] At the same time, Nash wrote in part about Randy Shaver and Jeff Passolt, Ryther's eventual younger replacements:

> RANDY SHAVER
>
> His continued improvement is primarily a matter of content. *None of the airchecks I viewed featured work that*

Most significant, however, in the consideration of the conflicting evidence, notwithstanding the earlier Atkinson reports, is Mason's personal review of Ryther's performance in March 1990. She gave him the rating of "commendable," the second highest mark possible, and indicated that "his work is done quickly and accurately; total job responsibilities are met." Mason's 1990 review of Ryther also stated in part: "As anchor: knows the market & key players/contacts[;] he wants to put on a good product – open to trying new ideas . . . . As sports director – has developed good working relationship with the movers & shakers of the professional & college sports world." *With this kind of commendation written as late as March 1990, it is readily understandable how the jury could reject the prior market research of "underperformance" as the reason for Ryther's termination.*

Even assuming that the "research" allegedly relied upon included *both* the Atkinson reports and the 1990 Gallup Survey, we conclude that there is sufficient evidence for a reasonable jury to find that it played little or no role in KARE 11's decision not to retain Ryther in 1991.

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was memorable or especially creative in any way. It was simply competent, animated sportscasting.

JEFF PASSOLT

The same criticisms apply to Jeff. His delivery is relaxed and professional. *It is not exceptional,* primarily because none of the stuff I saw featured any especially creative content.

Id. at E6-E7 (emphasis added).

This then brings us to the 1990 Gallup Survey – the market research upon which Mason and Rios Brook specifically say they relied in making the decision not to rehire Ryther.

B. Ryther's Claims that the 1990 Gallup Survey Was Biased

Ryther testified that the 1990 Gallup Survey questions were both designed *and* interpreted to provide an incomplete picture of viewers' perceptions of his performance. He initially challenged the 1990 Gallup Survey's methods as an incomplete means of obtaining research concerning his performance.

Gallup surveyed a random sample of viewers using two methods: a "Q score technique" and open-ended questions. The Q score technique employs multiple questions to measure audience recognition and approval (particularly strong like and dislike) of the selected personalities. Ryther was among twenty-five on-air personalities included in this portion of the survey.

Open-ended questions, by contrast, allow viewers to describe identified persons in their own words, and by Gallup's description are "designed to help [stations] gain a more complete understanding of what viewers think about key personalities." For example, the 1990 Gallup Survey asked viewers, "How would you describe Jeff Passolt? What comes to mind that you particularly like or dislike about him as a newscaster?" The ten key personalities included Rosen, Passolt, and KARE 11's other lead anchors, among others. Ryther, however, was excluded from this portion of the research.

Ryther also notes Janet Mason's admission that in advance of the research she told Gallup that one of the "important issues" about which KARE 11 sought information was "the sportscaster position." Although Mason identified Passolt and Rosen as "key personalities" for purposes of the research project, she did not so characterize Ryther. Rather, she justified the omission of open-ended questions about Ryther on the grounds that their inclusion would have made the survey "too long" and that similar questions had been asked about him in 1989 research conducted by Atkinson. Mason also admitted, however, that the 1989 Atkinson project asked such "free response" questions concerning each of the ten other "key personalities."

KARE 11 dismisses Ryther's argument that KARE 11 designed the 1990 Gallup Survey in a manner unfavorable to him as an irrelevant argument that is "without foundation and intrusive of KARE's business judgment." Reply Br. at 8. KARE 11's statement not only mischaracterizes Ryther's attack on the survey, which is plainly a claim that the survey was biased, but is incorrect as a matter of law. As the Supreme Court unanimously observed in *Burdine*, the fact "that the employer misjudged the qualifications of the [plaintiff] does not *in itself* expose [the employer] to . . . liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*" 450 U.S. at 259 (emphasis added). The jury may thus consider as wholly relevant *both* whether the 1990 Gallup Survey was designed in a manner that from the outset disfavored Ryther, *and* whether the survey was actually a sound – as opposed to pretextual – basis upon which to make employment decisions.

It remains an open question whether, standing alone, this evidence would support the jury's verdict. But we are concerned with whether the overall evidence supports a reasonable inference that age motivated KARE 11's actions. *Hicks*, 113 S. Ct. at 2749. To that end, Ryther's attack on the survey is probative. The *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior. *See Harvey v. Anheuser-Busch, Inc.*, 38 F.3d 968, 973 (8th Cir. 1994). Yet, in the nature of things, evidence that the defendant employer says it relied on inaccurate market research may assist the finder of fact in determining whether the employer is giving an honest explanation of its actions. *See Burdine*, 450 U.S. at 259.

As the district court held, the jury reasonably could have found KARE 11's explanations to be "trivial" and inferred that the real reason defendants omitted Ryther from the open-ended questions was a fear that the results of the survey would undermine their age-based decision not to renew his contract. Relatedly, a reasonable jury might also infer that, if it was unwieldy or redundant to repeat such questions about Ryther, KARE 11 ought to have excluded such repetitious questions about Passolt and Rosen as well. In other words, a reasonable jury could have reasoned that, if it was redundant and costly to ask open-ended questions about Ryther, it was redundant and costly to ask open-ended questions about Rosen, Passolt, and the other eight "key personalities," all of whom were included in the 1989 Atkinson research. The fact that KARE 11 did not include Ryther in this portion of the 1990 Gallup Survey reasonably suggests that KARE 11 had already decided to terminate Ryther. Moreover, as the district court stated, the long delay

between the research results and the time of Ryther's notice of dismissal reasonably suggests the defendants did not want to provide Ryther an opportunity to address his weaknesses, and thus supports the inference that KARE 11 had an age-based agenda to terminate Ryther. The jury had every right to believe that the survey was inadequate, biased, and in fact a subterfuge to mask KARE 11's age-based animus against Ryther.

C. Mason's Treatment of Ryther Before the Gallup Survey of 1990

The district court found sufficient evidence for the jury to conclude that Janet Mason's decision not to renew Ryther's contract was made before the 1990 Gallup Survey was commissioned. The evidence to this effect included Ryther's testimony that: (1) between 1988 and 1990, KARE 11 transferred his duties to younger members of the sports department; (2) when Mason assumed her role as Ryther's supervisor in 1988, KARE 11's managing editor Marie Kurken told him to "watch [his] back" because Mason "was out to get" him, and he "was number one on her list, on her hit list, to get out of that news room"; (3) Mason treated Ryther as though he "couldn't seem to do anything right"; and (4) when Mason took over, he "went from being a valued member of the news staff sports department to almost a – in Janet Mason's eyes, as an incompetent. And incidents kept happening that underlined and verified those words of Marie Kurken. It kept happening and happening and happening, so I noted them." In addition, there was documentary and testimonial evidence that Mason, in March

1990, gave Ryther the rating of "commendable," stating that his "work is done quickly and accurately; total job responsibilities are met," but shortly thereafter, when notifying him of his dismissal, explained the decision as based on the showing of earlier research that Ryther was a "failure" in the market.

In *McDonnell Douglas Corp.*, the Court observed that "evidence that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [plaintiff] during his prior term of employment." 411 U.S. at 804. As the unanimous *McDonnell Douglas* Court understood, evidence that the defendant treated the plaintiff, whose performance remained stable throughout the relevant period, differently upon a change in supervisors may, together with the elements of the prima facie case and evidence that the new supervisor "was out to get" him, support a reasonable inference that age motivated that difference in treatment. *Id.*; *see also Hicks*, 113 S. Ct. at 2749 (As the Court explained, a jury's disbelief of employer's explanation, together with prima facie case, suffices to show intentional discrimination "*particularly if* disbelief is accompanied by a suspicion of mendacity." (emphasis added)).[10]

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[10] Of course, the inference of unlawful discrimination first arises from the prima facie case itself, which "serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253-54; *see id.* at 258; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The inference of unlawful discrimination arises, *a fortiori*, however, from the rejection of defendant's explanation of its actions, as the jury's disbelief of defendant's reasons "eliminates" even more

A jury might reasonably infer from Ryther's "unimproved showing" that KARE 11 felt his long-term performance justified the non-renewal of his contract. But a reasonable jury might also infer that KARE 11's continuous approval and commendable ratings of that performance belie that claim. There exists substantial evidence that, after Janet Mason became Ryther's supervisor (and before the 1990 Gallup Survey), KARE 11 determined that Ryther's contract should not be renewed. Moreover, it cannot be said that *no* reasonable jury could have rejected as contrived Mason's explanation that she rated Ryther favorably in March 1990 out of fear that rating him unfavorably would cause him to fall apart emotionally. Such a statement may appear untruthful to reasonable sensibilities. A reasonable jury could also infer that Mason failed to notify Ryther of his alleged deficiencies for fear that he might correct them,[11] or that Mason treated Ryther as "an incompetent" because she harbored an age-based animus against him. *See Hicks*, 113 S. Ct. at 2749. In sum, a reasonable jury could infer that Mason had made a

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"nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 254.

[11] In this regard, Ryther's claim paralleled the proof of pretextuality plaintiff produced in our recent case of *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 802 (8th Cir. 1994):

> Because [defendant's] April 27, 1989, memo shows he had already decided that [plaintiff] should be terminated and given early retirement and because [defendant] did not in fact permit [plaintiff] to correct his work performance, the jury could reasonably infer that [defendant] was hiding a motivation to fire Nelson because of his age.

decision to terminate Ryther before the 1990 Gallup survey was conducted.

D. Ryther's Claims that KARE 11 Had a Corporate Atmosphere Unfavorable to Older Employees

The district court relied on several portions of the record in holding that Ryther's evidence of a corporate atmosphere unfavorable toward older employees could reasonably support the jury's inference that Ryther was the subject of age discrimination. KARE 11 contends this evidence is insufficient, noting that statements made by employees not involved in Ryther's non-renewal and stray remarks in the workplace do not give rise to a reasonable inference of discrimination. Not only is KARE 11's reduction of this evidence to a few "stray remarks" factually incorrect, but, more importantly, such evidence *can*, if sufficient together with other evidence of pretext, support a reasonable inference of age discrimination. As the Supreme Court stated in *McDonnell Douglas:*

> Other evidence that may be relevant to any showing of pretext includes facts as to the [employer's] . . . general policy and practice with respect to [older persons'] employment. On the latter point, statistics as to [defendant's] employment policy and practice may be helpful to a determination of whether [its] refusal to rehire [plaintiff] conformed to a general pattern of discrimination against [older employees].

411 U.S. at 804-05 (footnote and citations omitted).

Although Ryther did not present his case in the form of statistical evidence, he did offer testimony suggesting

KARE 11's actions "conformed to a general pattern of discrimination" against older employees. *Id.* at 805. This evidence included: Ryther's testimony that he was criticized for the bags under his eyes; Mason's testimony that she once considered allowing Ryther to wear glasses because she felt they might help cover them; testimony that several older employees were suddenly given poor performance ratings and forced to choose between early retirement and demotions; testimony that others in the sports department made cutting remarks about Ryther's age, calling him an "old fart," an "old man," and saying he was "too old to be on the air," and "had no business being in the industry any more for his age"; testimony that Shaver and Mason had frequent discussions about Ryther; and testimony that Shaver complained about Ryther to Mason on ostensibly age-related grounds. In the latter connection, the following excerpt from the testimony of Edward Villaume, a former sports department intern, is illuminating:

Q: Did you ever hear Randy Shaver make comments about Tom's age?

A: Yes, I did.

Q: And what comments did you hear Randy make about Tom's age?

A: Randy Shaver called Tom Ryther an old man, an old fart, and said he was too old to be on the air.

Q: Did you hear Jeff Passolt make any comments about Tom's age?

A: Yes, I did.

Q: And what comments did you hear Jeff Passolt make about Tom's age?

A: That Tom was an old man. He called him too old to be on the air, couldn't figure out why Randy and himself, Jeff, were not number one, and that Tom had no business being in the industry any more for his age, called him an old fart as well.

Q: Did you hear Randy Shaver make his comments on more than one occasion?

A: Yes, I did.

Q: Approximately how many times did you hear Randy Shaver make those comments?

A: I would say approximately ten or more.

Q: Did you hear Jeff Passolt make those comments on more than one occasion?

A: Yes, I did.

Q: And approximately how many times did Jeff Passolt make those comments?

A: Somewhere around ten. Not as often as Randy.

Q: Did you ever hear Dave Levine, or Levine, make comments about Tom Ryther's age?

A: Yes, I did. Dave would often chime right in with Randy and Jeff, or would make a comment on his own about Tom's age.

* * *

Q: Had you ever heard Randy Shaver complain to Janet Mason in your presence?

A: Yes.

Q: Can you tell us about what was said on that occasion when you were present when Randy complained to Janet Mason?

A: Randy had said to Janet that Tom was never around any more, that he was on the phone, and that he just wasn't able to grasp the new computer system and couldn't handle the, kind of the newer technology.

Q: Did you ever hear any other staff members make comments about Tom's age?

A: Yes.

Q: And who was that?

A: Brian Singer, who was a camera man, had mentioned that more than once, and also had mentioned the fact that he could not understand how Tom was still in the business and why Randy and Jeff were not the number one anchor position there in the sports department.

KARE 11 argues that the statements referenced in this testimony were not those of persons responsible for the decision not to renew Ryther's contract. To the extent that these statements were made outside the presence of the decisionmakers, KARE 11 is correct that they do not, *standing alone*, raise an inference of discrimination. *Compare Frieze*, 950 F.2d at 541-52 (reversing denial of defendant's motion for JNOV) *with Morgan v. Arkansas Gazette*, 897 F.2d 945, 950-51 (8th Cir. 1990) (affirming denial of defendant's motion for JNOV). The evidence also reveals,

however, that Shaver and Mason had frequent discussions about Ryther, and that they discussed Ryther's ability to "grasp" some of the "newer" developments at the station. Furthermore, other evidence shows that Mason was generally responsive to Shaver's ideas and demands, including his request that Ryther be taken off Prep Sports Extra. The jury could thus reasonably infer that Mason formed her judgment about Ryther on the basis of the discriminatory comments frequently made by Shaver, Passolt, Levine, and Singer, and acted on them by terminating him.

KARE 11 dismisses the testimony of three former KARE 11 employees that the station was systematically ridding itself of older employees because those employees were dissimilarly situated and because " 'individual employees' opinions of actions taken by their employer, . . . in themselves, are insufficient to support [Ryther's] argument that his age was a determining factor in his discharge.' " Appellants' Br. at 35 (quoting *Morgan*, 897 F.2d at 950 (alteration ours)).[12] As to KARE 11's

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[12] The district court more properly observed:

> Finally, there was evidence that defendants forced other older employees to choose between demotions or early retirement. Several of the older employees were suddenly given poor performance reviews after receiving years of superior ratings. Defendants contend that evidence concerning the older employees was not relevant because they were not on-air talent and, therefore, were not similarly situated to Ryther. Although the situations of the older employees and Ryther differ in some respects, the court finds there were enough similarities to render the evidence relevant and admissible. The

reliance on *Morgan*, we think Judge John R. Gibson's opinion for this Court in *Morgan* supports our conclusion:

> Much of the testimony recited above can be described as no more than individual employees' opinions of actions taken by their employer, which, *in themselves*, are insufficient to support Morgan's argument that his age was a determining factor in his discharge. There was, however, evidence that, during Tinker's administration, *a pattern of employees over the age of forty leaving the circulation department and being replaced by younger employees developed.* As we observed in *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054 (8th Cir. 1988), in a similar context, "[t]his fact is certainly not conclusive evidence of age discrimination *in itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome.*" *Id.* at 1058.

897 F.2d at 950-51 (emphasis added) (footnote omitted). The *Morgan* court went on to conclude that "additional threads of evidence which can be gleaned from the record," including a reference to a former employer as an "old 'fuddyduddy' [who was] not smart enough to help" his department, and one employee's "observation of a trend away from older, more experienced employees toward younger ones," "support[ed] a finding that age was a determining factor in the decision to fire" the

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> court also concludes that a jury could reasonably find that defendants intentionally built poor performance cases against older employees, including Ryther.

Ryther, 864 F. Supp. at 1519.

plaintiff. *Id.* at 951. Thus, while the statements of sports department employees are not, "in themselves," sufficient to uphold the district court, those statements were relevant to the jury and, together with other evidence of pretext, such as a "trend" toward younger employees, and the elements of the prima facie case, support a reasonable inference of age discrimination.

The dissent argues that the articulation of a non-discriminatory reason (*i.e.*, Ryther's low ratings from the market research, which allegedly show that he performed his job unsatisfactorily) destroys one of the elements of the prima facie case. This is wrong for several reasons. First, KARE 11 has never contended on appeal that Ryther failed to make a prima facie case; second, in determining whether KARE 11 is entitled to a judgment as a matter of law, it is incumbent upon the trial court and the judges of this court to give the benefit of all favorable inferences to Ryther, who is the verdict holder; third, a trier of fact, when considering all of the evidence could reasonably find that the market research and the low rating of KARE 11's sports department were based upon KARE 11's own admission that it did not promote sports (and that "sports was relatively unimportant"); in addition, the record contains evidence, which the jury could reasonably believe, that the 1990 Gallup Survey, upon which Mason and Brook said they specifically relied in making the decision not to renew Ryther's contract, was biased against Ryther; fourth, notwithstanding the earlier market research, KARE 11 as late as 1990 declared that Ryther performed his job in a "commendable" way and that his "total job responsibilities are met;" fifth,

notwithstanding the earlier market research, Ryther's contract was renewed three times with substantial raises.

Clearly, under the state of this record, whether Ryther was in fact performing his job satisfactorily and whether his performance met the reasonable expectations of KARE 11 was a question of fact for the jury.

In summary, the record as a whole supports a reasonable inference that *age*, and not some other factor, motivated KARE 11's decision not to renew Ryther's contract. The plaintiff produced overwhelming evidence as to the elements of a prima facie case,[13] and strong evidence of

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[13] There exists no magical language in instructing a jury as to the elements of a prima facie case in a given situation. *See Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (internal quotations omitted) ("The prima facie case method established in *McDonnell Douglas* was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.") This court, following the established guidelines set down by the Supreme Court, has repeatedly set forth these elements in substantially the same terms as those used in 3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions: Civil § 106.03* (4th Ed.1987). *See, e.g., Clements v. General Accident Ins. Co. of Am.*, 821 F.2d 489, 491 (8th Cir. 1987). This same language was adopted by Judge Doty in giving the instructions in the present case. In a case written by Judge Hansen on which Judge Loken sat, the court reiterated that:

> Thus, to make a prima facie case of age discrimination, Nelson must show that 1) he was within the protected age group, 2) that he was performing his job at a level that met his employer's

pretextuality, which, when considered with Ryther's work environment's indications of age-based animus, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination. If this evidence is not sufficient for the plaintiff's case to be submitted to a jury, it is difficult to hypothecate what evidence may ever achieve the threshold standard set forth by *Burdine* and *Hicks*. And, as the experienced district court judge stated, "[i]t is clear that the jury believed Ryther's evidence and did not believe defendants' proffered explanation." *Ryther*, 864 F. Supp. at 1517.

IV

In the alternative, KARE 11 requests a new trial. KARE 11 asserts it was prejudicial error to admit unconnected evidence and that the jury was given inaccurate and confusing instructions. We review both the district court's admission of the evidence, *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990), and its choice of instructions, *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132 (8th Cir. 1994), for clear abuses of discretion.

A. The Evidentiary Rulings

KARE 11 seeks a new trial on the basis of the district court's evidentiary rulings. In particular, KARE 11 challenges the admission of evidence concerning settlement agreements, "stray remarks," and anecdotal stories of

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legitimate expectations, 3) he was discharged, and 4) his employer attempted to replace him.

Nelson, 26 F.3d at 800 (internal quotations omitted).

other individuals, all of which, it asserts, were unconnected to KARE 11's decision to terminate Ryther.

A new trial based on evidentiary rulings is appropriate only when the challenged rulings were "so prejudicial as to require a new trial which would be likely to produce a different result." *O'Dell*, 904 F.2d at 1200. For the reasons stated by the district court, *Ryther*, 864 F. Supp. at 1523-25, we do not find that to be the case here.

B. The Jury Instructions

A party is entitled to an instruction which accurately states the law and is supported by the evidence. *See, e.g., EEOC v. Atlantic Community Sch. Dist.*, 879 F.2d 434, 436 (8th Cir. 1989). The jury instructions below adhered to the *Hicks* standard. *See Hicks*, 113 S. Ct. at 2749.[14]

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[14] The court's instruction carefully told the jury:

> Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.
>
> In deciding whether plaintiff's age was a determining factor in defendants' decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence.
>
> First, plaintiff was within the protected age group, that is, he was 40 years of age or over.
>
> Second, plaintiff's job performance was satisfactory.
>
> Third, plaintiff was terminated from his job when his contract was not renewed.
>
> Fourth, a younger person with similar credentials replaced plaintiff.

KARE 11 asserts that these instructions failed to make clear that the jurors must find intentional age discrimination in order to return a verdict in Ryther's favor. We disagree. The instructions acknowledged KARE 11's proffered explanation for its decision and stated that Ryther was required to prove that its explanation was "merely a pretext or cover-up for intentional age

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> If plaintiff has failed to prove one or more of these facts, you must find for the defendants.
>
> If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.
>
> If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason, other than age, for not renewing plaintiff's contract.
>
> Defendants have offered evidence of legitimate nondiscriminatory reasons for their actions. Therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination.
>
> You should not consider whether the reasons given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you may disagree with defendants' decision or believe it was harsh or unreasonable.

Furthermore, as Judge Doty pointed out, these instructions substantially conform with 3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions: Civil* § 106.03 (4th Ed. 1987). *Ryther*, 864 F. Supp. at 1521.

discrimination." We cannot say the court abused its discretion in failing to instruct the jury otherwise.[15]

V

KARE 11 also asks the Court to reverse the jury's finding of willfulness and to vacate its corresponding award. The station suggests a finding that it was negligent or aware of the ADEA is insufficient, in and of itself, to support a finding of willful discrimination, and urges that the only evidence of willfulness here is testimony

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[15] The dissent's challenge to the sufficiency of the district court's instruction is somewhat puzzling. Assuming, for the sake of argument, the instructions were deficient in failing to mention the various evidentiary nuances suggested by the dissent, these evidentiary concerns were neither the basis of KARE 11's objection in the district court nor, for that matter, raised on appeal. In addressing the issue here, the dissent ignores the admonition of Fed. R. Civ. P. 51, which requires a specific objection to instructions to preserve such a claim on appeal.

Furthermore, at no stage of this litigation has KARE 11 claimed that this is a "reduction-in-force" case. Such a defense does not appear in KARE 11's briefs, nor was the case pled or tried in this manner in the district court. At the instruction conference, the only reference that was made to reducing the force was defense counsel's objection to the language in the court's instruction that the plaintiff had to prove "a younger person with similar credentials was assigned to do the same work." Defense counsel suggested it would be more appropriate, rather than to use the word "assigned," to instruct that "a younger person with similar credentials replaced Mr. Ryther." Defense counsel emphasized that "replaced" was a neutral word. The court acquiesced in this request, there was no objection by plaintiff's counsel, and defense counsel approved the court's change in the instruction to read: "A younger person

that KARE 11 had anti-discrimination employment policies and had instructed managers concerning how to execute those policies.

The Supreme Court has stated that a violation of section 7(b) of the ADEA, 29 U.S.C. § 626(b), is willful " 'if the employer knew or showed reckless disregard for

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with similar credentials replaced plaintiff." After this colloquy, defense counsel said that he did not have any other objections. For the dissent now to argue that the jury should have been instructed about a reduction in force is factually inaccurate and irrelevant to the case. To suggest, in the absence of such an objection at trial, that a new trial should now be given on the basis that the instructions were not technically correct, is indeed disturbing. *See Anderson Marketing, Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (8th Cir. 1995) (per curiam) ("It is a fundamental rule of federal appellate procedure that we may only pass on a district court's ruling if a party challenges that ruling on appeal by raising the issue in its opening brief."); *id.* (collecting cases); Fed. R.App. P. 28(a)(2), (4).

Furthermore, as outlined in our opinion, the alleged evidentiary deficiencies raised by the dissent not only are without merit, but misconstrue the purpose behind the court's instructions in a jury case. To suggest that a jury should be instructed on the argumentative details of evidence, in order better to understand a party's theory of the case, totally ignores the role of the trial court in instructing the jury on the law governing their deliberations.

It is not for the trial court, in instructing the jury, to emphasize the evidence favorable to one side over the other. This is especially true when the inferences to be drawn from the overall evidence are conflicting and could lead to different results. As Justice Frankfurter urged years ago, juries are not "too stupid to see the drift of evidence." *United States v. Johnson*, 319 U.S. 503, 519 (1943). Moreover, such a suggestion is totally out of order when a party does not request a specific instruction or object to the instructions given.

the matter of whether its conduct was prohibited by the ADEA.' " *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (quoting *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985) (internal quotation marks and ellipsis omitted in original)). Upon review, the issue is whether a rational jury could have concluded KARE 11's conduct met this standard. *Glover v. McDonnell Douglas Corp.*, 12 F.3d 845, 848 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1647 (1994).

KARE 11 is correct to suggest that conduct that is " 'merely negligent' " will not support a finding of willfulness. *Biggins*, 507 U.S. at 615 (quoting *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)). It is also well established that our concern is not simply whether the employer acted voluntarily, but whether it consciously violated the ADEA. *See Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 560 (8th Cir. 1993) (en banc); *MacDissi v. Valmant Indus., Inc.*, 856 F.2d 1054, 1061 (8th Cir. 1988). Thus, the Supreme Court has declined to hold "that a violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA." *Thurston*, 469 U.S. at 127.

That said, the employee need not, to prove willfulness, show "that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision." *Biggins*, 507 U.S. at 617. And, as the *Biggins* Court emphasized, "[i]t would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal,

knowledge alone does not suffice for liquidated damages." *Id.*

Ample evidence supports the jury's finding that KARE 11 "more likely [knew] its conduct to be illegal" here. The record reveals that KARE 11 had equal employment opportunity ("EEO") policies that clearly forbade age-based discrimination, and that its managers received EEO and affirmative action training. Other testimony showed that all of KARE 11's managers were instructed to prevent age discrimination. KARE 11's directives spelled out that, before terminating an older employee, the manager should document the difficulties and offer the employee help and retraining. Yet Ryther received no such assistance or offers.

This is not, however, the only evidence suggesting KARE 11 acted willfully. As noted above, Ryther testified that Mason repeatedly treated him "as though he couldn't seem to do anything right," and that he "went from being a valued member of the news staff sports department to almost a – in Janet Mason's eyes, as an incompetent." Such evidence of repeated harassment may, together with other evidence, support a finding of willfulness. *See Kelewae v. Jim Meagher Chevrolet, Inc.*, 952 F.2d 1052, 1054 (8th Cir. 1992) (per curiam) (repeated incidents of harassment about the quality of employee's work in conjunction with suggestions that he retire supports finding of wilfulness). Here, further evidence showed that Mason and the others responsible made the decision not to renew Ryther's contract prior to commissioning the 1990 Gallup Survey, but concealed that decision from him, perhaps because they

did not want to give him a chance to improve his performance. This evidence, too, supports a finding of willfulness. *See Tolan v. Levi Strauss & Co.*, 867 F.2d 467, 471 (8th Cir. 1989) ("Evidence of concealment may show the employer knew its conduct violated the ADEA.").

As the district court stated, "[i]t is clear that defendants were more than merely aware of the ADEA statute," and "[t]his is not a case where the employer incorrectly, but in good faith, believed that the statute permitted a particular age-based decision." *Ryther*, 864 F. Supp. at 1520. The entirety of the evidence suggests they knew they were violating the law in terminating Ryther on the basis of his age. At a minimum, it suggests those responsible were recklessly indifferent to the ADEA's requirements.

VI

The judgment of the district court is therefore affirmed.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. I conclude that KARE 11 is entitled to judgment as a matter of law or, at a minimum, a new trial.

As the court explains, when a discrimination case is submitted to the jury, the presumption created by plaintiff's prima facie case is no longer relevant. But if the plaintiff has no direct evidence of age discrimination, as in this case, the elements of the prima facie case remain relevant, for they *may*, along with proof of pretext, satisfy plaintiff's ultimate burden to prove age discrimination.

Hicks, 113 S. Ct. at 2749. Thus, in submitting this case, the district court instructed the jury on four elements of Ryther's prima facie case. *See* footnote 12, *supra* at p. 23.

There is no rigid formula defining the elements of a prima facie case of discrimination. *See United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 715 (1983). The elements necessarily vary depending upon, for example, the type of adverse employment action that is challenged and the nature of the alleged discrimination. But in every case, those elements must be sufficient to raise a valid inference of unlawful discrimination. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-77 (1978). Here, the district court in my view failed to properly define the elements of Ryther's prima facie case. To explain why, I must review some *undisputed* facts concerning Ryther's employment history with KARE 11.

Ryther was first hired as Channel 11's lead sportscaster in 1979, when he was 41 years old and the station was under different ownership. Ryther was given a three-year fixed term contract at an initial annual salary of $55,000. The contract was renewed in 1982. Gannett/KARE 11 acquired Channel 11 in 1983. KARE 11 renewed Ryther's contract for additional three-year terms in 1985 and 1988. During the final year of the 1988 contract, Ryther was paid an annual salary of $160,000.

Television broadcasting stations commonly conduct periodic market research to survey the popularity of both the station and its on-air "personalities" in the local market. In December 1981, the independent research firm of Atkinson-Farris Communications surveyed the Twin Cities television audience for Channel 11. The researchers

reported that Channel 11 was a distant third in "rating" among the three Twin Cities network affiliates.[1] Regarding the popularity of Ryther, Atkinson-Farris reported:

> The situation for Tom Ryther is particularly unfortunate. First, his overall [Quality] Score is not impressive (17), but more important, viewers of [Channel 11] are not even enthusiastic. A Quality Score of 18 from supporters of a personality's own station is extremely low.

Between May 1986 and October 1988, Gannett's in-house research organization conducted a number of "Tracking Studies" of the Twin Cities market. These studies showed Ryther's market impact and ability to attract viewers holding steady, well below KARE 11's newly-hired news and weather anchors. The studies also revealed that Mark Rosen, the new lead sportscaster for arch-rival WCCO, had already passed Ryther in these popularity measures.

In 1989, the Atkinson research firm again surveyed the Twin Cities television audience for KARE 11. It found that KARE 11's news programs had made "massive progress" since 1981, pulling even with WCCO in overall customer preference, well ahead of the third network affiliate. It found that KARE 11's lead news anchor had "the broadest base of support among newscasters in the market," and that its weather anchor was "the on-air person with the broadest appeal and greatest pulling power." However, it characterized KARE 11 sports as

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[1] A station's rating (number of viewers) is critical because advertising charges, and therefore revenues, depend upon rating.

"the softest part of your team." It found that Ryther had "virtually the same ratings he had in our 1981 project," while Mark Rosen "has been able to come into the market during that time and pass Ryther." The report also noted that sports was relatively unimportant to viewers in choosing a local news program; only five percent of the persons surveyed listed sports as a reason for their newscast preferences.

In 1990, KARE 11 retained the Gallup organization to again survey the Twin Cities market. The Gallup survey again found that sports was a "low interest" facet of KARE 11's broadcasts, with a value of six percent (compared, for example, to weather's 76 percent). Gallup also reported that Ryther had relatively high viewer recognition (76 percent, compared to 81 percent for Mark Rosen), but low net impact (28 percent, compared to 45 percent for Rosen). KARE 11's other sportscasters, Jeff Passolt and Randy Shaver, had low recognition and low net impact. Because a widely recognized personality should attract more viewers, Gallup's expert, Dr. Frank Newport, testified that Ryther's scores – high recognition but low net impact – placed him in Gallup's "penalty box." The Gallup report concluded:

> The data suggest that Tom Ryther is not a strongly positive factor for KARE. The sportscaster position is the only front four role which is not filled by a very strong player for KARE. Ryther himself does below average on many of the key indicators created in this research: he underperforms based on where we think he should be based on his recognition and years in market.

> Passolt, on the other hand, is no superstar either. His overall net impact, in fact, is roughly the same as Ryther's. The plus for Passolt would appear to be that he has a lower recognition, and thus is now performing at a higher level rel[ative] to where we think that he should be. Thus, it is our opinion that Passolt has the higher potential for the station.
>
> At any rate, a change in sportscaster would appear to have a relatively low down-side risk for the station as Ryther is no star as is.

Shortly after receiving the Gallup report in the fall of 1990, KARE 11 decided not to renew Ryther's contract in July 1991. However, the station also decided to leave Ryther in place until his three-year contract expired in July 1991.[2] Because KARE 11 permitted Ryther to complete his three-year contract term, the refusal to offer him a new contract in 1991 was, in essence, a refusal to hire. Thus, no matter how favorable Ryther's internal performance reviews at KARE 11 had been in the past, the relevant question in July 1991 was whether he was qualified to be hired (or rehired) as the lead sportscaster at a Twin Cities television station at a salary of $160,000 per year.

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[2] Incredibly, the court repeatedly draws adverse inferences from KARE 11's delay in advising Ryther of its decision not to renew. Having properly concluded to honor its contractual commitment, KARE 11 would have been foolish, as well as insensitive, to advise this high-profile employee of its adverse decision before Spring 1991.

The district court's jury instruction took no account of this critical aspect of the case. Far worse, the instruction quoted in footnote 12 significantly misstated the elements of Ryther's prima facie case when it instructed the jury to find whether, "Second, plaintiff's job performance was satisfactory," and "Third, plaintiff was terminated from his job when his contract was not renewed." This instruction told the jury to ignore the fundamental difference between the decision whether to rehire an employee whose fixed-term contract has expired, and the decision whether to terminate an employee who has worked without the guaranteed but limited security of a fixed-term contract.

The instructions also ignored another essential aspect of the evidence in this case that impacts upon the elements of a prima facie case. The 1989 and 1990 research showed that (i) KARE 11 had gained substantial overall ratings despite a weak sports anchor, and (ii) sports attracts relatively few Twin Cities viewers. Following Ryther's non-renewal, his duties were spread among the remaining KARE 11 sportscasters; no one was added to the KARE 11 sports team. The independent market research justified KARE 11's decision to reduce this part of its newsroom force by not renewing an underperforming, highly compensated lead sportscaster and redistributing his job among the remaining staff. *Compare Thomure v. Phillips Furniture Co.*, 30 F.3d 1020, 1024 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1255 (1995). Thus, the case had evidentiary elements of a reduction-in-force, and the jury should have been instructed accordingly.

In my view, this was prejudicial instruction error. Given ten years of market research showing that Ryther

lacked the ability to attract local viewers, *no* Twin Cities station would have considered him qualified for his former position and salary.[3] Thus, the independent market research gave KARE 11 a powerful, objective business reason for not renewing Ryther's contract that, in addition, refuted an essential element of his prima facie case. *Compare Hayman v. National Acad. of Sciences*, 23 F.3d 535, 538 (D.C. Cir. 1994); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1216 (8th Cir. 1985), *cert. denied*, 475 U.S. 1058 (1986).[4] And this research was disinterested, objective evidence gathered and offered at trial by third party professionals. *See Dace v. ACF Indus., Inc.*, 722 F.2d 374, 377 n.6 (8th Cir. 1983).

In these circumstances, Ryther's purported pretext evidence failed to create a submissible case of age discrimination. When the employer's objective evidence not only tends to establish a legitimate, nondiscriminatory

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[3] The court's focus on the fact that Ryther finished second to Mark Rosen in Gallup's study of net impact on viewers reminds me of a Russian parable describing the Soviet press. After President Kennedy defeated Chairman Krushchev in a 100-yard dash, *Pravda* reported: "Our beloved Nikita finished a respectable second place, while the American President was a dismal next-to-last."

[4] At trial, KARE 11's three decisionmakers consistently identified market research as the reason Ryther was not rehired. Janet Mason testified, "the primary information or tool that we used in making that decision was the research." Linda Rios Brook testified Ryther was not renewed "[o]n the basis of the research. That was the overriding reason." Richard Modig testified, "Well, it was really the research. I think the research, especially over a long period of time, was crystal clear."

reason for the adverse employment action, but also effectively refutes the plaintiff's prima facie case, I think it highly unlikely that pretext evidence can support a reasonable inference of age discrimination. Evidence of pretext "is relevant only to the extent it contributes to an inference that [KARE 11] intentionally discriminated against [Ryther] because of his age. *See Hicks*, 113 S.Ct. at 2749." *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).[5]

To summarize, ten years of independent market research established that Ryther was the overpaid, underperforming anchor of the least significant segment of KARE 11's news team. Gallup recommended a change, and KARE 11 acted on that recommendation. "[T]he issue is not whether the reason articulated by the employer warranted the discharge, but whether the employer acted for a nondiscriminatory reason." *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 292 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983). Although Ryther obviously persuaded the jury that KARE 11 treated him unfairly, I conclude he

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[5] A prime example of irrelevant pretext evidence are the scraps of newsroom backbiting related at length in the court's opinion. To survive, television stations must focus on a personality's ability to attract audience, not on his age or the bags under his eyes. One of the most beloved sportscasters today is the elderly Harry Caray, whose nationwide broadcasts of Chicago Cubs baseball games have helped make the perennially unsuccessful Cubs one of the most popular teams in the National League. Does the court seriously believe that KARE 11 would have non-renewed a term contract with Harry Caray because some ambitious but unproven underling complained that he was an "old fart" who shouldn't be on the air?

did not prove intentional age discrimination. Therefore, this case presents the same situation we faced in *Barber v. American Airlines, Inc.*, 791 F.2d 658, 661 (8th Cir.), *cert. denied*, 479 U.S. 885 (1986):

> We have carefully read every page of the testimony at this trial, and we are persuaded that this stringent standard [for setting aside a jury verdict] has been met. The jury could rationally have believed that plaintiffs ought in good conscience to have been permitted to stay in Little Rock . . . but there is absolutely no substantial evidence in this record that would justify attributing American's actions to plaintiffs' age.

Like the panel in *Barber*, I would hold that the district court erred in denying KARE 11's post-trial motion for judgment as a matter of law. At a minimum, I believe that the district court's prejudicial instruction errors warrant a new trial.[6] For these reasons, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[6] I agree with KARE 11 that the instruction quoted in footnote 12 did not properly convey to the jury the Supreme Court's teachings in *Hicks*. I note that the court does not approve that instruction, and I would discourage its use in future cases.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

C. Thomas Ryther,

Plaintiff,

v.

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Defendants.

Civil No. 4-91-943

ORDER

Donna L. Roback, Esq. and Larkin, Hoffman, Daly & Lindgren, 500 Norwest Financial Center, 7900 Xerxes Avenue South, Bloomington, MN 55431, counsel for plaintiff.

Thomas Tinkham, Esq., Karen Clauson Maki, Esq. and Dorsey & Whitney, 220 South Sixth Street, Minneapolis, MN 55402, counsel for defendants.

This matter is before the court on defendants' motions for judgment as a matter of law and, in the alternative, a new trial and a reduction of damages. Based on a review of the file, record and proceedings herein, the court denies defendants' motions.

BACKGROUND

C. Thomas Ryther ("Ryther") worked as a sports anchor at Channel 11 from December 1979 until July 1991, pursuant to a series of three year contracts. In 1988, Janet Mason became the vice president of news at KARE 11, which is owned by Gannett. At that time, Ryther was the sports director and lead sports anchor. The sports department included Jeffrey Passolt ("Passolt") and Randy Shaver ("Shaver"), both under age 40. Ryther appeared on the six o'clock and ten o'clock news and hosted a weekly show during the football season. Passolt did a sports feature on the five o'clock news and was a reporter and weekend anchor along with Shaver.

In 1988, KARE 11 assigned Passolt to host the weekly football show. The following year Linda Rios-Brook ("Brook") was named the station manager at KARE 11. During 1989, Mason switched Ryther from the six o'clock news to a sports segment feature on the five o'clock news. Passolt became the sports anchor at six o'clock and Ryther continued to anchor the ten o'clock sports. Ryther worried that the loss of air time would adversely impact his visibility. In March 1990, Mason rated Ryther's performance as "commendable," the second highest mark possible. Two months later, Mason named Shaver executive producer of sports, a title that belonged to Ryther under his contract. Shaver assumed many of Ryther's organizational and planning duties. Ryther agreed to the change based on Mason's assurance that he would retain the right of final approval on all planning matters. However, according to Ryther, the promise was not honored and he was excluded by Mason and others from key planning decisions.

In June 1990, defendants hired the Gallup Organization ("Gallup") to assess audience reaction to certain on-air personalities in the Twin Cities market. Gallup surveyed a random sample of viewers using a "Q score tecnnique" and open-ended questions. The Q score technique consists of multiple choice questions concerning viewer recognition and approval of on-air personalities. The Q score is widely used in the media industry to show viewer attachment to a personality by measuring the percentage of viewers who recognize the person and the percentage of viewers who are strongly favorable or strongly unfavorable of that person. The information obtained from open-ended questions provides a more complete picture of what viewers think about key personalities.

KARE 11 directed Gallup to use the Q score technique to measure the strength of 25 on-air personalities, including Ryther. The research results indicated that Ryther was well known in the market but his impact on viewers was less positive than the other lead anchors at KARE 11 and Mark Rosen ("Rosen"), the lead sports anchor at a competing station. Ryther's positive impact was slightly higher than that of Passolt who was not as well known in the market. KARE 11 also instructed Gallup to ask open-ended questions about 10 local personalities, including the other lead anchors at KARE 11, Passolt and Rosen.[1] KARE 11 did not ask the viewers such questions about Ryther. After evaluating the viewer

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[1] For example, Gallup asked viewers "How would you describe Jeff Passolt? What comes to mind that you particularly like or dislike about him as a newscaster?"

data, Gallup recommended changing the lead sportscasters at KARE 11 and suggested that Passolt may have more "potential." According to defendants, the decision not to renew Ryther's contract was made in August 1990 based on the results of the Gallup research. In the fall of 1990, Mason removed Ryther's salary from the sports department budget but did not tell him of defendants' decision.

In early 1991, Ryther discovered he was being excluded from promotions. Ryther asked Brook about the status of his contract and she referred him to Mason. On March 6, 1991, Mason told Ryther, then 53 years old, that his contract would not be renewed when it expired at the end of July. Mason said that Ryther had failed in the Twin Cities market and explained that the decision not to renew his contract was based on the 1990 Gallup research. On July 16, 1991, Ryther held a press conference to announce he had filed an age discrimination claim with the Equal Employment Opportunity Commission. KARE 11 took Ryther off the air the same day but compensated him for the last two weeks of his contract. Ryther brought suit against defendants alleging defamation and age discrimination and retaliation in violation of federal and state law.

An eight day jury trial was held in September 1993. The ultimate issue in the case turned on whether a legitimate or an illegitimate set of considerations led to defendants' decision not to renew Ryther's contract. At the close of plaintiff's case, defendants moved for judgment as a matter of law on all claims. The motion was granted as to Ryther's defamation claim but was otherwise denied. The remaining claims were submitted to the jury

at the close of evidence. The jury returned a verdict for Ryther on his age discrimination claim and awarded $272,444.00 in back pay and $433,330.30 in front pay. The jury also found that defendants' violation of the ADEA was willful. The jury found in favor of defendants on the retaliation claim.

Defendants now move for judgment as a matter of law claiming that the court erred in not holding as a matter of law that Ryther failed to establish that age was a determining factor in the decision not to renew his contract and failed to prove willfulness. In the alternative, defendants move for a new trial based on certain evidentiary rulings and certain jury instructions given and refused by the court. Defendants also claim that the damage award should be reduced because the award of front pay is speculative and Ryther failed to mitigate his damages.

DISCUSSION

1. Judgment As A Matter of Law

Defendants assert that Ryther's contract was not renewed because his research was poor, he was not contributing to the station's success and his work performance was unsatisfactory. Ryther contends the reasons offered by defendants for his discharge are pretextual and that age was the motivating factor for not renewing his contract. Defendants insist that Ryther failed to demonstrate a link between his age and the decision not to renew his contract. They also argue that there was no evidence of pretext that focused on the specific reasons offered by defendants.

Defendants as a proponent of a motion for judgment as a matter of law confront a difficult standard. In ruling on a motion for judgment as a matter of law, the court must consider the evidence in the light most favorable to Ryther, assume that the jury resolved all conflicts in favor of Ryther, assume as true all facts which Ryther's evidence tended to prove and give Ryther all favorable inferences which may reasonably be drawn from proved facts. *Hall v. State Farm Fire & Cas. Co.*, 813 F.2d 137 (8th Cir. 1987).[2] The court must deny the motion if reasonable jurors could differ as to the conclusions that could be drawn from the evidence. *Id.*

A. Ryther's Prima Facie Case

To make a prima facie case of age discrimination, Ryther must show that: (1) he was within the protected age group, (2) his job performance was satisfactory; (3) his contract was not renewed; and (4) defendants assigned a younger person with no better credentials to do the same work. *Haglof v. Northwest Rehabilitation Inc.*, 910 F.2d 492, 493 (8th Cir. 1990). *See e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Proof of a prima facie case allows Ryther to benefit from a presumption of discrimination. At that point, defendants may rebut the prima facie case by coming forward with a legitimate, nondiscriminatory reason for not renewing Ryther's contract. Once the prima facie case has been rebutted, Ryther

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[2] The 1991 amended version of Rule 50(b) changed the terminology, but not the standard articulated in long-standing case law. *See* Fed. R. Civ. P. 50 advisory committee's note on 1991 amendment.

must carry his ultimate burden of persuasion by proving that defendants intentionally discriminated against him based on age. *See, e.g., Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

At this stage, the court looks to the ultimate factual issue of whether the evidence is sufficient to allow the jury to infer that age was a determining factor in defendants' decision not to renew Ryther's contract. Although the sufficiency of Ryther's showing of a prima facie case need not be analyzed, the court briefly addresses defendants' contention that Ryther failed to establish a prima facie case of age discrimination. Despite defendants' arguments to the contrary, the court finds that Ryther proved the elements of a prima facie case of age discrimination by a preponderance of the evidence.

There is no dispute that Ryther was within the protected age group when his contract was not renewed. Defendants assert that Ryther did not meet their legitimate expectations because he was not drawing substantial viewers. Defendants mistakenly equate their proffered reason for not renewing Ryther's contract with whether he established a prima facie case. The claim that Ryther failed to attract viewers goes to the issue of whether there was a legitimate business reason for defendants' actions. Excluding defendants' proffered reasons for not renewing Ryther's contract, there is ample evidence, including positive performance appraisals, to

support the finding that Ryther's performance was satisfactory.[3]

Defendants also assert that Ryther failed to state a prima facie case because he was not replaced by a younger person. The evidence was sufficient to show that Ryther was replaced by Passolt, who was 37 years old when he took over as lead sports anchor at KARE 11. During the term of Ryther's last contract, Passolt replaced Ryther as the sportscaster at six o'clock. In March 1991, Mason offered the ten o'clock sportscast to Passolt and Passolt was later promoted to the ten o'clock newscast after Ryther was removed from the air. Viewed in the light most favorable to Ryther, the jury could reasonably conclude that Passolt replaced Ryther by assuming his former duties as lead sports anchor. There was also evidence from which the jury could reasonably find that KARE 11 systematically transferred duties performed by Ryther to younger members of the sports department during his last contract.

B. Sufficiency of the Evidence

The court now turns to the critical issue at hand; whether the evidence was sufficient for the jury to reasonably conclude that defendants intentionally discriminated against Ryther because of his age. Defendants

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[3] In March 1990 Ryther was rated "commendable." While this was not the highest possible rating, it did indicate that "work is done quickly and accurately; total job responsibilities are met." The written appraisal also contained several positive remarks about Ryther's performance. Ryther's previous performance appraisals rated his work as "superior."

assert they are entitled to judgment as a matter of law based on the testimony of the decision makers that Ryther's contract was not renewed because of the Gallup research. It is clear that the jury believed Ryther's evidence and did not believe defendants' proffered explanation. Construing the record in Ryther's favor, the court finds that he produced evidence sufficient to discredit defendants' nondiscriminatory reason for not renewing his contract.

This is not a case, however, where the employer's proffered reason is wholly without merit or obviously contrived. Thus, to carry his ultimate burden of persuasion, Ryther must do more than discredit defendants' proffered explanation. Ryther must also present evidence sufficient to show that conduct by decision makers reflects a discriminatory attitude based on age and that the real reason defendants decided not to renew his contract was age discrimination. Whether Ryther's evidence was sufficient to support the jury's verdict is a close question. After carefully reviewing the record, however, the court concludes that the jury reasonably could have found that defendants were motivated by a discriminatory animus based on Ryther's age.

Based on the evidence presented, the jury reasonably could have concluded that defendants made the decision not to renew Ryther's contract before the Gallup research was even undertaken. There was evidence that between 1988 and 1990 KARE 11 transferred many of Ryther's duties to his younger counterparts. The jury reasonably could have concluded that the transfer of these duties to younger members of the sports department indicated not only that defendants had already decided not to renew

Ryther's contract, but also that defendants' conduct reflected a discriminatory attitude based on Ryther's age.

In March 1990 several middle managers rated Ryther as transitional and identified areas needing improvement. Defendants never communicated these appraisals to Ryther. Rather, Mason rated Ryther as commendable, indicating that "work is done quickly and accurately; total job responsibilities are met." Mason explained that the higher rating was neither accurate or based on Ryther's work performance. Instead Mason said she gave Ryther a higher rating because she feared an emotional outburst and believed Ryther would perform better if he received a commendable rating. The jury reasonably could have rejected the explanation provided by Mason as contrived. Mason's fear of an overly emotional reaction is belied by her telling Ryther that he had "failed in the market" when she revealed that his contract would not be renewed. Moreover, the jury could reasonably infer that Mason did not disclose the appraisals to Ryther because the decision not to renew his contract had been made and, thus, Mason did not want to provide Ryther with an opportunity to correct any perceived deficiencies.

The evidence presented by Ryther also allowed the jury to reasonably draw the inference that defendants knew the research, as designed, would not provide a complete picture of what viewers thought about Ryther. In designing the research, KARE 11 directed Gallup to ask open-ended questions about key personalities, including the other lead anchors at KARE 11, Passolt and Rosen. However, KARE 11 did not ask such questions concerning Ryther. Defendants explained that the survey would have been too lengthy and that similar questions

had been asked about Ryther in a 1989 research project. The 1989 research, however, also posed open-ended questions about Rosen and Passolt. The jury reasonably could have found that the length of the survey was a trivial factor and, thus, was not the true reason why defendants omitted Ryther from the open-ended questions.

Taking this evidence in Ryther's favor, the jury reasonably could have concluded that omitting Ryther from the open-ended questions signalled that defendants had already decided not to renew his contract. The jury could also draw the inference that defendants merely hoped the research results would confirm the decision they had already made rather than provide detailed information about Ryther's impact on the viewing audience. The jury could also attribute unsavory motives to defendants given the long delay between the research results and the time Ryther was told that his contract would not be renewed. Again, the jury reasonably could have inferred that defendants did not want to provide Ryther with an opportunity to address any perceived weaknesses.

Defendants also admitted that a higher standard was used to evaluate Ryther than was applied to Passolt. Defendants explained that the different standards were justified because Ryther was the primary sports anchor occupying a "front four" position and Passolt was a less experienced, secondary anchor. The jury, of course, was entitled to reject defendants' explanation or characterization of the roles of Ryther and Passolt. Viewed in favor of Ryther, the evidence was sufficient for the jury to reasonably find that age, not the roles and experience of Ryther and Passolt, was the real reason defendants held the anchors to different standards.

In the years preceding the Gallup survey, defendants assigned Passolt to replace Ryther as the host of a weekly football show. Passolt was also promoted to the six o'clock news and Ryther was switched to a less visible sports feature on the five o'clock news. Although Ryther continued to anchor the sports at ten o'clock, the jury could reasonably conclude that at the time of the survey Passolt was a "key personality" at KARE 11. That conclusion finds support in the fact that KARE 11 considered two female anchors who alternated between newscasts as key personalities. It also finds support in defendants' decision to ask open-ended questions about Passolt but not about Ryther. Thus, the evidence would permit the jury to reasonably reject the explanation that defendants treated Ryther and Passolt differently because of the roles they occupied at KARE 11. The jury could also reasonably infer that defendants treated Ryther differently than his younger counterpart because of his age.

Other circumstantial evidence also supports the jury's verdict. The jury could have reasonably found that defendants emphasized youthful appearances. Defendants admitted they believed the bags under Ryther's eyes detracted from his appearance and they discouraged Ryther from wearing glasses. Mason stated that she once considered allowing Ryther to wear glasses because she felt the glasses might help cover the bags under his eyes that lighting and make-up could not remove.

There was also evidence that others in the sports department frequently made comments about Ryther's age. Shaver and others called Ryther "old man" and "old fart" and said he was "too old for the business." The remarks were not made by or in the presence of the

decision makers or senior management. The remarks standing alone do not raise an inference of discrimination. There was evidence, however, that Shaver and Mason had frequent discussions about Ryther. Thus, the jury could have reasonably inferred that Mason knew of the discriminatory attitude on the part of Shaver and others in the sports department.

Finally, there was evidence that defendants forced other older employees to choose between demotions or early retirement. Several of the older employees were suddenly given poor performance reviews after receiving years of superior ratings. Defendants contend that evidence concerning the older employees was not relevant because they were not on-air talent and, therefore, were not similarly situated to Ryther. Although the situations of the older employees and Ryther differ in some respects, the court finds there were enough similarities to render the evidence relevant and admissible. The court also concludes that a jury could reasonably find that defendants intentionally built poor performance cases against older employees, including Ryther.

After reviewing all the evidence in the light most favorable to Ryther and giving him the benefit of all favorable inferences, the court concludes there was sufficient evidence for the jury to reasonably infer that Ryther's age was more likely than not a motivating factor in defendants' decision not to renew his contract. While the court considers the issue to be close, and although it may have reached a different result had it been the fact-finder, the court's task is to examine the sufficiency of the evidence, not to act as the trier of fact. *Nelson*, 26 F.3d at 803. (quotation omitted). The court concludes that the

evidence was sufficient to support the jury's finding of intentional age discrimination.

C. Willfulness

Defendants also contend that the evidence was insufficient to support the jury's finding that defendants willfully violated the ADEA. A plaintiff is entitled to liquidated damages, or double damages, if the employee can prove that the employer willfully violated the ADEA. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708-10 (1993). A violation of the ADEA is not willful merely because the employer knew the ADEA was "in the picture." *Trans-World Airlines, Inc. v. Thurston*, 469 U.S. 111, 132-33 (1985); *Biggins*, 113 S. Ct. at 1709. A violation of the ADEA is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Biggins*, 113 S. Ct. at 1710; *Brown v. Stites Concrete, Inc.*, 994 F.2d 553, 558-59 (8th Cir. 1993) (en banc). "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision." *Biggins*, 113 S. Ct. at 1710. In reviewing a jury's finding of willfulness, the sole relevant determination is whether the evidence meets the standard that the employer "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [ADEA]." *Brown*, 994 F.2d at 560.

The court concludes that the jury could have reasonably inferred that defendants knew their conduct violated

the ADEA. It is clear that defendants were more than merely aware of the ADEA statute. Defendants had employment policies which stated they would not discriminate against any member of a protected class. A former program director at KARE 11 said that defendants instructed managers on procedures to guard against age discrimination and prevent accusations of age discrimination. Defendants assert that they had no reason to know their reliance on the Gallup research could later be construed as discriminatory. The jury concluded, however, that defendants' decision not to renew Ryther's contract was not based on the market research. As the court has noted, the jury could reasonably infer that defendants made the decision not to renew Ryther's contract before the research was undertaken and, rather than inform Ryther, began building a poor performance case against him. This is not a case where the employer incorrectly, but in good faith, believed that the statute permitted a particular age-based decision. *See, e.g., Biggins*, 113 S. Ct. at 1709. Although the court may have reached a different result, the court concludes that there was sufficient evidence for a reasonable jury to find that defendants' willfully violated the ADEA by not renewing Ryther's contract.

2. Motion For A New Trial

A new trial may be ordered under Fed. R. Civ. P. 50(b) and 59(a) when the verdict is against the clear weight of the evidence, is the result of passion or prejudice or is clearly excessive. *Ouachita Nat. Bank v. Tosco Corp.*, 686 F.2d 1291, 1294 (8th Cir. 1982). While the standard for granting a new trial is less stringent than for

judgment as a matter of law, a new trial shall be granted only to prevent injustice or when the verdict strongly conflicts with the great weight of evidence. *Fireman's Fund Ins. Co. v. Aalco Wrecking Co., Inc.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). The court is not free to set aside a verdict merely because it would have ruled differently, or believes that the jury should have drawn different inferences and conclusions from the conflicting testimony. *Id.* at 186-87.

The true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. *Id.* at 187. Defendants contend that justice requires a new trial in this case. The court has already concluded that the verdict reached by the jury in this case is adequately supported by the evidence. Of course, defendants or other reasonable persons could differ about the correct outcome, but the verdict does not work an injustice or fall against the great weight of the evidence.

Defendants also move for a new trial asserting that the court erroneously ruled on certain evidentiary matters and that certain jury instructions were erroneously given or refused by the court. Not all errors require a new trial. The court should grant a new trial only if it finds that an error "misled the jury or had a probable effect on its verdict." *E.I. Du Pont de Nemours v. Berkley & Co., Inc.*, 620 F.2d 1247, 1257 (8th Cir. 1980). Rule 61 of the Federal Rules of Civil Procedure provides that:

> No error or defect in any ruling or order or in anything done or omitted by the court . . . is ground for granting a new trial . . . unless

> refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

The burden of proving harmful error rests on the party moving for a new trial.

A. Jury Instructions

The instructions given to a jury must be read as a whole and considered in light of the entire charge. *Williams v. Valentec Kisco, Inc.*, 964 F.2d 723, 731 (8th Cir. 1992). The court is not bound to give the jury instructions requested by the litigants. Rather, "the form and language of jury instructions are committed to the sound discretion of the district court so long as the jury is correctly instructed on the substantive issues in the case." *Id.* Although defendants purport to "assign as error the failure to give each requested instruction or portion of instruction not given and the giving of each instruction to which objection was posed," they focus on four omissions which they consider particularly prejudicial. For the following reasons, the court holds that a new trial is not warranted based on the instructions given to the jury.

(1) Instruction Number 20

Defendants claim that instruction number 20 given by the court omitted the "essence of the prevailing law on age discrimination." Defendants [sic] contends the court's language was inadequate because it failed to instruct the jury that plaintiff retained the burden of persuading them

that his contract was not renewed because of his age. They also contend that instruction number 20 allowed the jury to find discrimination based solely on the first phase of the *McDonnell Douglas* analysis. The court finds these contentions lack merit.

Instruction number 20 was drawn primarily from § 106.03 of 4 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions: Civil,* (4th ed. 1987). The court also considered the Supreme Court's decision in *St. Mary's Honor Center v. Hicks,* 113 S. Ct. 2742 (1993). Despite defendants' contention to the contrary, instruction number 20 in no way intimated that Ryther could prevail simply by establishing a prima facie case. The jury was instructed that it could find for Ryther only if he proved that age was a determining factor in defendants' decision not to renew his contract. The jury was also instructed that, because defendants had offered a legitimate, non-discriminatory reason for their actions, to prevail Ryther had to prove that the proffered reason was a pretext or cover-up for defendants' intentional age discrimination. Thus, the jury was properly instructed that Ryther had the burden of proving defendants' reasons were pretextual and that he was, in fact, a victim of intentional age discrimination. The court holds that instruction number 20 was not erroneous as it fairly and adequately presented the substantive law.[4]

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[4] Moreover, instruction number 20 was buttressed by the other instructions given by the court. Instruction number 4 stated that Ryther had the burden "to prove every essential element of his claim by a preponderance of the evidence." Instruction number 5 further explained what it meant for a party to have the burden of proof on a given proposition.

(2) Defendants' Proposed Instruction Number 3

Defendants contend that the court erred by failing to give their requested jury instruction number 3 verbatim. Defendants proposed an instruction which combined §§ 70.03 and 71 08 of 4 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions: Civil*, (4th ed. 1987). Defendants claim they were prejudiced by the omission of the proposed language that "[a]nything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded." Defendants drew that language from § 70.03 of Devitt, Blackmar & Wolff.

Section 70.03, a preliminary instruction, addresses what constitutes evidence. Before the case began, the court gave the preliminary instruction from the Bench Book for United States District Court Judges, which communicated the substance of § 70.03 to the jury before the beginning of the case. The court repeatedly admonished the jury throughout the trial that they could not read, view or consider any news coverage or any other information about the case. The court finds that the jury was properly instructed to disregard information from other sources and to decide the case based solely on the evidence presented at trial. In lieu of defendants' instruction, the court instructed the jury almost verbatim from § 71.08 of Devitt, Blackmar & Wolff. The court concludes that the instruction given was accurate and addressed the substance of defendants' requested instruction. The exclusion of the exact language proposed by defendants was not erroneous and did not result in prejudice.

(3) Defendants' Proposed Instruction Number 15

Defendants claim that the court erred by failing to give their requested jury instruction number 15 concerning discriminatory remarks in the workplace.[5] Defendants relied on two Eighth Circuit cases as authority for their proposed instruction. *See Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993); *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). These cases discussed remarks in the workplace in the legal context of determining whether a plaintiff was entitled to a mixed-motive instruction as established by *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). In both cases, the Eighth Circuit concluded that "stray remarks" do not suffice to invoke the *Price Waterhouse* formula. The *Price Waterhouse* method of proof was not employed in this case. Thus, defendants failed to cite any authority which provided direct guidance on the necessity or propriety of a jury instruction on this issue.

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[5] Defendants' proposed instruction number 15 stated that:

> Not all comments that reflect a discriminatory attitude will support an inference that age was a determining factor in an employment decision. You must distinguish between comments that demonstrate age discrimination in the decision process and comments made by individuals closely involved in the employment decision from stray remarks in the workplace, statements by non-decisionmakers, and statements by decisionmakers unrelated to the decisional process. The latter types of comments do not support an inference that age was a determining factor in an employment decision.

The court has discretion to refuse any instruction that is not entirely correct. The gist of defendants' instruction was that only remarks by decision makers involved in the decisional process could support an inference of discrimination. However, there was evidence from which the jury could have reasonably inferred that the statements made by Shaver and others in the sports department were conveyed to Mason, a decision maker who played a key role in the decisional process. Although Mason denied any knowledge of the statements, her credibility was properly left for the jury to decide.

The court concludes that the instruction requested by defendants improperly characterized the law as it related to this case. Here the significance of the discriminatory remarks turned on the resolution of disputed facts. The instruction at issue would have removed this factual determination from the jury. The court concludes that it properly exercised its discretion in declining to give defendants' instruction number 15. Given the evidence of discrimination apart from the discriminatory remarks, the court also notes that no prejudice resulted from the error defendants allege.

(4) Defendants' Proposed Instruction Number 16

Defendants contend that the court erred by failing to give their requested jury instruction number 16 verbatim.[6] Defendants complain that the court erroneously failed to instruct the jury on the minimal nature of their burden of production. Defendants also contend the court erred by not instructing the jury that reliance on market research is an appropriate basis for making decisions in the broadcast industry. These contentions lack merit.

At trial, defendants asserted that Ryther's contract was not renewed because his research results were poor and he was not contributing to the station's success. Defendants also cited Ryther's unsatisfactory work performance. Under *McDonnell Douglas,* the employer meets its burden of production simply by producing evidence of nondiscriminatory reasons for its actions. *Hicks,* 113 S. Ct. at 2748. At the charge conference, defendants argued that they had carried their burden of production. The court

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[6] Defendants' instruction stated:

> If you find that plaintiff has initially established an inference of age discrimination, as I have just defined it for you, then you must consider whether KARE 11 has presented a nondiscriminatory reason for its actions. The burden on KARE 11 is minimal. KARE 11 bears only the burden of producing evidence to demonstrate reasonable factors other than age for not renewing plaintiff's contract. The ultimate burden of persuasion remains with plaintiff.
>
> An employer is entitled to rely in good faith on broadcast market research as an appropriate, nondiscriminatory basis for making personnel decisions in the broadcast industry.

agreed and, accordingly, instructed the jury that "[d]efendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination." Jury Instruction No. 20.

The instruction given explicitly told the jury that the reason proffered by defendants, namely the market research results, was a legitimate, non-discriminatory reason for their actions. The court rejected defendants' language that "an employer is entitled to rely in good faith on broadcast market research as an appropriate, non-discriminatory basis for making personnel decisions in the broadcast industry." Although defendants offered expert testimony concerning the heavy reliance the media industry places on market research, the court was not obligated to take judicial notice of that fact. The ultimate issue here, whether defendants' actions were motivated by the research results or Ryther's age, was, of course, an issue properly left to the jury to decide.

Defendants also complain that the court's instructions impermissibly allowed the jurors to substitute their own judgment for the employer's judgment. This argument borders on being frivolous. The court explicitly instructed the jury:

> You may not consider whether the reasons given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you disagree with defendants' decision or believe it to be harsh or unreasonable.

Jury Instruction No. 20. The court's language was drawn from the Eighth Circuit's decision in *Walker v. AT & T Technologies*, 995 F.2d 846, 849-50 (8th Cir. 1993), and the model instructions for the Eighth Circuit. *See* The Bar Association of Metropolitan St. Louis, Model Civil Rights in Employment Jury Instructions for the Eighth Circuit § 7.03(a) (1989). While the court did not adopt the exact language proposed by defendants, it concludes that the instruction given properly stated the substantive law about an employer's right to make business judgments absent unlawful discrimination.

B. Evidentiary Rulings

Defendants also seek a new trial based on certain evidentiary rulings. Defendants challenge rulings made concerning employment actions and the release of age discrimination claims by former KARE 11 employees and an offer of an alternative position to Ryther. The mere existence of evidentiary errors is not a sufficient basis for a new trial. Rather a new trial is appropriate under Rule 59 only when "an evidentiary ruling was so prejudicial as to require a new trial which would be likely to lead to produce a different result." *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990). The court concludes that a new trial is not warranted in this case as no error was committed that prejudiced the substantial rights of defendants.

Several witnesses who testified at trial were former KARE 11 employees who reached severance or separation agreements with defendants. The agreements required the former employees to release all potential claims

against defendants, including claims of age discrimination. The court concluded that the severance agreements did not fall within the bar of Rule 408 of the Federal Rules of Evidence. *See Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1343 (9th Cir. 1987)(Rule 408 does not bar admission of an agreement to release potential claims as part of a severance pay package). The court also recognized that evidence of agreements between defendants and former employees was relevant and admissible to show bias. Given the nature of the evidence, however, the court took care to properly limit its introduction in order to prevent unfair prejudice to defendants.

Defendants' claim that evidence was admitted concerning six severance agreements is unfounded. Defendants seem to raise a belated objection to statements made by Ryther's counsel during her opening statement. Any challenge to the opening statement has been waived, however, as defendants failed to object at trial. Limited testimony concerning claims released via severance agreements was allowed at trial.[7] The evidence was admitted to assist the jury assess the credibility of certain witnesses. Defendants contend the evidence was offered to improperly suggest that KARE 11 had admitted it discriminated against former employees on the basis of their age. Despite this concern, defendants never requested a limiting instruction. The court concludes that

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[7] The court notes that defendants offered testimony concerning a severance package during the direct examination of one of their witnesses. The court also sustained numerous defense objections to questions designed to elicit detailed information about various severance agreements and the release of potential claims of age discrimination.

the admission of the challenged evidence was not erroneous. The court also notes that if any evidentiary error occurred it was not so prejudicial as to warrant a new trial.

Defendants also claim the court erred by not admitting evidence of an offer of alternative employment to Ryther. They claim evidence of the job offer should have been allowed to refute Ryther's claim that he was never offered an alternative position.[8] Defendants also assert the offer of employment was relevant to mitigation. The offer to which defendants refer was extended by defendants' attorneys on the condition that Ryther not file any discrimination claims against defendants. The offer involved a sports reporter position paying up to $50,000. The offer was made after Ryther indicated he was filing claims of age discrimination with the EEOC and was quickly withdrawn once he indicated he would pursue his claims. Because the offer of employment was extended only on the precondition that Ryther not pursue his claims of age discrimination and was subsequently withdrawn, the court concludes that it had little, if any, relevance to the issues identified by defendants. Accordingly, the court concludes that the exclusion of the evidence was not erroneous. The court also notes that if any error occurred it was not so prejudicial as to warrant a new trial.

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[8] At trial, Ryther testified that defendants did not offer him an alternative position. Mason and Brook also testified that Ryther was not offered another position as [sic] the time of his termination.

Finally, defendants complain the court erred by admitting evidence concerning the employment circumstances and separation from employment of other former employees. Defendants assert the evidence concerning the other employees was not relevant as they were not similarly situated to Ryther either because they were not on-air talent or they were affected by employment decisions made by others unrelated to the decision not to renew Ryther's contract.

While the situations of the other former employees and Ryther differ in some respects, the court finds there was a sufficient, although not overwhelming, showing of a pattern and practice of discrimination to warrant admission of the evidence offered by Ryther. The evidence was relevant to the issue of pretext and aided the jury's ability to assess whether defendants acted with a legitimate or illegitimate motive. As with the severance agreements, the evidence admitted concerning other employment circumstances was carefully circumscribed by the court. The court concludes that the admission of the challenged evidence was not erroneous. The court also notes that if any evidentiary error occurred it was not so prejudicial as to warrant a new trial.

3. Motion to Reduce Damage Award

Defendants assert that the amount of the verdict should be reduced for two reasons. Defendants contend the amount of the front pay award is speculative. Defendants argue the award assumes that Ryther's contract would have been renewed twice with him remaining employed in the same position for six additional years.

Front pay, by its nature, is somewhat speculative. The award here, taking into account salary as well as fringe benefits and pension loss, seems to reflect the amount Ryther would have earned during the course of one additional three year contract. Although the damages awarded by the jury are generous, the front pay is adequately supported by the evidence and is not unduly speculative.

Defendants also assert that the back pay award should be reduced because Ryther failed to use reasonable efforts to mitigate his damages. The burden of proof on mitigation rests with the defendants. The court rejects defendants' challenge to jury instruction number 30 and holds that the jury was properly instructed on the substantive law of mitigation. There is ample evidence from which the jury could have reasonably concluded that Ryther used reasonable efforts to obtain alternative employment and mitigate his damages. Accordingly, the court denies defendants' motion to reduce the back pay and front pay damages awarded by the jury.

CONCLUSION

The evidence supports the jury's verdict. After reviewing all the evidence in the light most favorable to Ryther and giving him the benefit of all favorable inferences, the court concludes there was sufficient evidence for the jury to reasonably infer that Ryther's age was more likely than not a motivating factor in defendants' decision not to renew his contract. The court also concludes that a new trial is not warranted in this case as no error was committed that prejudiced the substantial

rights of defendants. The court also denies defendants' motion to reduce the damages award. Based on the foregoing, **IT IS HEREBY ORDERED** that defendants' motions for judgment as a matter of law and for a new trial or a reduction of damages are DENIED.

Dated: September 13, 1994

/s/ David S. Doty
David S. Doty, Judge
United States District Court

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3622MNMI

C. Thomas Ryther,

Appellee,

vs.

KARE 11, etc., et al.,

Appellants.

* Appeal from the United States District Court for the District of Minnesota

Appellants' petition for rehearing and suggestion for rehearing en banc has been considered by the court and is granted. The opinion and judgment of the court entered on May 31, 1996 are vacated. The case is set for oral argument before the court en banc at 10:30 A.M., Tuesday, October 22, 1996, in the Federal Courts Building, 316 North Robert Street, St. Paul, Minnesota.

August 29, 1996

Order Entered at the Direction of the Court

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
F I L E D
APR 24 1997
CLERK

No. 96-1571

In the
Supreme Court of the United States
October Term, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Supreme Court review the propriety of giving a jury instruction which was not requested by either party at the trial court level nor raised as an issue on appeal?

2. Does a district court have discretion to give a jury instruction which fully and correctly states the law but does not include the specific language requested by a party?

3. Should the Supreme Court grant certiorari where the resolution of a possible conflict in the federal circuits regarding the holding in the Supreme Court case of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) will not change the outcome of a case which has met a strict application of *Hicks* upon a motion for judgment as a matter of law?

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No. 96-1571

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent C. Thomas Ryther ("Ryther") includes this Statement of the Case, pursuant to Rules 15.3 and 24.2 of the Rules of the Supreme Court of the United States, as the Petition for a Writ of Certiorari ("Petition") misstates facts and mischaracterizes the *en banc* decision of the Eighth Circuit.

Ryther rejects the factual portion of the Petition's Statement of the Case because petitioners KARE 11, Combined Communications Corporation, and Gannett Co.,

Inc. ("KARE") improperly state the facts in the light most favorable to KARE and, from these facts, draw impermissible inferences. *See Brook Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993); *Eckenrode v. Pennsylvania R. Co.*, 335 U.S. 329 (1948).

Ryther, a sportscaster at a television station in Minneapolis/St. Paul, Minnesota for 12 years, brought claims of age discrimination under the Federal Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, (1967), as amended, against KARE after he was terminated in July 1991. Ryther was 53 years old at the time of his termination and was replaced by a 33-year-old subordinate who was attracting fewer viewers in the market. KARE claims that it relied on market research when making the decision to terminate Ryther.

Ryther proved the decision to terminate his employment was made prior to the market research being initiated and KARE used the research as an excuse to terminate him. Ryther was treated less favorably than the younger sportscasters, and his performance and integrity were inappropriately challenged by KARE management to the point of humiliation. Additionally, KARE created an atmosphere that was antagonistic to older employees.

A more detailed review of the factual record appears in Sections I and III of the majority opinion in *Ryther v. KARE II*, 108 F.3d 832 (8th Cir. 1997) (*en banc*), and is adopted herein by reference. *See* App., pp. 3-6, 11-30.[1]

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[1] References to the Appendix attached to the Petition are designated as "App."

The Eighth Circuit, sitting *en banc*, affirmed the trial court's denial of KARE's motions for judgment as a matter of law and for a new trial in an opinion written by Judge Donald Lay, formerly the Chief Judge of the Eighth Circuit Court of Appeals. The majority opinion clarifies the standard for determining whether a plaintiff has presented sufficient evidence to sustain a jury verdict on an age discrimination claim. The court held that a verdict is sustainable only if the evidence of pretext is consistent with a reasonable inference of discrimination. App., p. 9. The court carefully examined the evidence in the case and determined that Ryther had presented "sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination." App., p. 28.

The Eighth Circuit affirmed the denial of KARE's motion for a new trial, finding that the language of the jury instruction adequately placed the burden of proving age discrimination on Ryther. The majority opinion did *not* address the propriety of a jury instruction proposed in E. Devitt, C. Blackmar, M. Wolff, *Federal Jury Practice and Procedure* ("*Devitt & Blackmar*") or the propriety of omitting burden-shifting language altogether as these issues were not raised by KARE either at trial or on appeal.

KARE's misstatement of the facts and mischaracterization of the Eighth Circuit decision are evident in the "Questions Presented" portion of the Petition. While the second question raises issues of stray comments and adverse actions against other employees, these issues are not addressed in the Petition. Therefore, Ryther has included a "Questions Presented" section in his Brief in Opposition to Petition for a Writ of Certiorari.

REASONS FOR DENYING PETITION

I. THE SUPREME COURT SHOULD NOT REVIEW THE PROPRIETY OF GIVING A JURY INSTRUCTION WHICH WAS NOT REQUESTED BY EITHER PARTY AT THE TRIAL COURT LEVEL NOR RAISED AS AN ISSUE ON APPEAL.

KARE urges this Court to review the *en banc* decision of the Eighth Circuit to resolve a perceived split among the circuit courts on the issue of whether a jury should be instructed on the *McDonnell Douglas*[2] burden-shifting paradigm. Petition, pp. 21, 23. KARE discusses, at length, the views of various circuits on the advisability of giving a *McDonnell Douglas* instruction, arguing that "once an employee [sic] offers a legitimate reason for the decision, burden-shifting instructions become irrelevant and misleading." Petition, p. 22. KARE has not preserved this issue for review. *See City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257 (1987). KARE did not object to the court giving a burden-shifting instruction and even proposed its own comprehensive instructions on the *McDonnell Douglas*

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[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case established the procedure by which circumstantial evidence of discrimination is evaluated. A plaintiff bears the initial burden of proving a *prima facie* case of discrimination. The burden then shifts to the employer to articulate a non-discriminatory reason for its employment action. If the employer meets this burden of production, the inquiry moves to the ultimate issue of discrimination. The plaintiff must prove that the proffered reason is a pretext for discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

analysis. In *City of Springfield*, this Court held, "We think . . . that there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." *City of Springfield*, 480 U.S. at 259.

When the trial court indicated a willingness to exclude all burden-shifting language from its jury instruction, KARE ignored the offer.

> THE COURT:
>
> * * *
>
> All that is -- that, you know, the maneuvering in the McDonnell Douglas context -- is, you know, that pretext -- you know, the way it starts out, "Is there discrimination?" And the plaintiff has to prove that he was discriminated against.
>
> Now under McDonnell Douglas -- which is really a test set up for courts; it wasn't sit [sic] up for juries; it was set up for courts to deal with it -- there is a prima facie case that you brought on and, if the defendants can show that they had a good reason, therefore the prima facie case goes away -- and if you start trying to tell the jury all of those concepts, pretty soon they get so confused.

> All that is, is a way of bringing forth the evidence, and dealing with the production-shifting issues, and I am not even sure we should put any of that in.
>
> You know, if you were to say, "Let's just knock out the last part of that," I would be tempted to agree.
>
> MR. TINKHAM: I think, Judge, that from the defendant's point of view we have the right to have the jury understand as a matter of law that, if the reason offered has not been proven pretext, they are to find there is no discrimination. That is what this instruction does not do. So that I think that it has to say that in some fashion, that -- given the fact that there has been an offer of non discriminatory reasons -- unless that is proved to be pretext, we are entitled to an answer "No" to question one.

TR VII/171-172.[3] KARE did not take the opportunity to have a jury instruction given which omitted the *McDonnell Douglas* language.

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[3] The transcript is cited herein as "TR" followed by the volume number and then page number.

KARE did not raise the issue of whether a burden-shifting instruction should have been given in its post-trial motions, its appeal to the Eighth Circuit, or its motion for rehearing *en banc*. Neither the trial court nor the Eighth Circuit panel discussed the issue. The issue was only addressed by the dissent in the *en banc* decision, which indicated, *in dictum*, a preference for such an instruction. KARE now has inappropriately raised this issue for the first time in the Petition. This Court should not address the propriety of giving a *McDonnell Douglas* jury instruction because KARE did not preserve the issue for appeal.

II. THE TRIAL COURT'S JURY INSTRUCTIONS FULLY AND CORRECTLY STATED THE APPLICABLE LAW.

KARE fails to articulate any justification for this Court's review of whether the trial court's jury instructions sufficiently set forth Ryther's burden of proof. The trial court is allowed broad discretion in formulating jury instructions. *See United States v. Logan*, 49 F.3d 352 (8th Cir. 1995). The trial court crafted a *McDonnell Douglas* jury instruction which twice stated that Ryther bore the burden of proving age discrimination.[4] The trial court's rejection of the specific

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[4] The instruction included the following language:

* * *

> In order for you to find for plaintiff, *plaintiff must prove* by a preponderance of the evidence that his *age was a determining factor* in the defendants' decision not to review his contract.

* * *

language requested by KARE does not render the instruction reversible error or worthy of certiorari. *See Stemmons v. Missouri Dept. of Corrections*, 82 F.3d 817, 819 (8th Cir. 1996) (party is not entitled to "demand" that a jury instruction include specific language); *Slathar v. Sather Trucking Corp.*, 78 F.3d 415 (8th Cir.) (actual wording of instructions is within discretion of trial court as long as jury receives an accurate explanation of the law), *cert. denied*, _____ U.S. _____, 117 S. Ct. 179 (1996); *Cf. Victor v. Nebraska*, 511 U.S. 1, ___, 114 S. Ct. 1239, 1242 (1994) ("The Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.").

KARE masks the narrow issue of the exercise of discretion in formulating jury instructions by arguing that the jury instruction at issue will be used by other courts as it is derived from a standard jury instruction guide. KARE erroneously states that the *en banc* court "split evenly" on the propriety of a jury instruction contained in *Devitt & Blackmar*. Petition, p. 3. The majority opinion never addressed the *Devitt & Blackmar* instruction. The Supreme Court's standard for review by certiorari does not include editing *Devitt & Blackmar*, particularly where the instruction

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> Defendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, *plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age* discrimination.

Petition, pp. 9-10 (emphasis added).

given differs significantly from the published instruction. *See* Sup. Ct. R. 10.1.

KARE acknowledges that the jury instruction given by the trial court differs from the *Devitt & Blackmar* instruction in the critical language explaining the effect of the prima facie case. Petition, p. 18. KARE fails to note, however, that the jury instruction also differs from the model instruction in its description of the plaintiff's final burden. Whereas the *Devitt & Blackmar* instruction would permit the jury to find for the plaintiff if the reason proffered by the employer was not truthful, the trial court's instruction specifically requires the plaintiff to prove that "the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination." Petition, p. 10. The trial court exercised independent discretion in crafting the jury instruction, and there is no compelling reason for this Court to scrutinize the chosen language.

KARE further contends that the Eighth Circuit's reliance on a general instruction setting forth plaintiff's burden of proof to buttress the burden-shifting instruction is inconsistent with *Francis v. Franklin*, 471 U.S. 307 (1985). In *Francis*, a criminal defendant challenged a jury instruction which required the jury to draw an inference of intent unless rebutted. While recognizing that a jury instruction must be considered within the context of all the instructions, the Court found that a general instruction regarding the burden of proof could not cure the Constitutional defect of a mandatory presumption of intent contained in another instruction. *Francis*, 471 U.S. at 315, 326. Unlike the mandatory presumption involved in *Francis*, the *McDonnell Douglas* jury instruction at issue here contained a *permissive* presumption. In *Cupp v. Naughten*, 414 U.S. 141 (1973), another criminal case involving claims of deprivation of

Constitutional rights, the Court held that a general instruction on the burden of proof and an instruction on the presumption of innocence were sufficient to correct any error in an instruction that every witness is presumed to tell the truth. Consistent with *Francis* and *Cupp*, the Eighth Circuit, sitting *en banc*, found that any alleged error in the burden-shifting instruction was overcome by the directive contained in the general instruction on plaintiff's burden of proof.

Finally, KARE argues that a question propounded by the jury demonstrates that the alleged error in the *McDonnell Douglas* jury instruction affected the outcome of the trial. KARE asks this Court to take an inappropriate leap of faith that the jury's question was engendered by the allegedly erroneous instruction. The Court's role in granting certiorari is not to review a case merely to attempt a futile inquiry into the jury's thought process.

The only jury instruction issue properly included in the Petition, the burden-shifting language used by the trial court, is not worthy of review by certiorari.

III. THE SUPREME COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE RESOLUTION OF A POSSIBLE CONFLICT IN THE CIRCUIT COURTS WOULD NOT AFFECT THE OUTCOME.

KARE, to gain review of this case on certiorari, misrepresents the *en banc* opinion of the Eighth Circuit in its Petition. KARE incorrectly interprets the opinion as allowing plaintiffs to avoid judgment as a matter of law upon a mere showing of a prima facie case and pretext. *Compare* App., pp. 9-11 *with* Petition, pp. 3, 24. In its Petition, KARE has ignored the Eighth Circuit's clearly articulated standard:

> This is not to say that, for the plaintiff to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination. [Footnote omitted]. Furthermore, as the *Hicks* Court explained, the plaintiff must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination. [Footnote and citation omitted]. Obviously, in all age discrimination cases, the plaintiff must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the traditional tests of summary judgment and judgment as a matter of law.

App., pp. 10-11. Part I.A. of the dissenting opinion, which is joined by seven judges, further defines the legal standard adopted by the Eighth Circuit.

> . . . [U]nder this standard, while plaintiff may rely on the same

> evidence to prove both pretext and discrimination, that evidence must be sufficient to prove that the employer is guilty of intentional discrimination. Therefore, a trial judge may decide on a motion for summary judgment or JAML that the evidence is insufficient for a reasonable trier of fact to infer unlawful discrimination, even if plaintiff has presented some evidence of pretext. We review rulings on such motions under our traditional summary judgment and JAML standards.

App., p. 39. KARE's characterization of the *en banc* decision is inconsistent with both the majority and dissenting opinions in this case. *See* Petition, p. 24.

After misstating the standard adopted by the Eighth Circuit *en banc*, KARE suggests this case is worthy of the Court's review because other federal circuits have taken inconsistent positions regarding the proper interpretation of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). KARE cites *Sheridan v. E.I. DuPont deNemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*), *pet. for cert. filed,* 65 U.S.L.W. 3571 (Feb. 3, 1997) and *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (5th Cir. 1996) (*en banc),* as exemplifying the opposite positions which the circuits have taken.

In *Sheridan*, the Third Circuit, sitting *en banc*, held that the jury has the right to infer discrimination from evidence

which is sufficient to establish a prima facie case and the dishonesty of the employer's explanation for its action.

> . . . [O]nce the court is satisfied that the evidence meets this threshold requirement, it may not pretermit the jury's ability to draw inferences from the testimony, including the inference of intentional discrimination drawn from an unbelievable reason proffered by the employer.

Sheridan, 100 F.3d at 1072. The Third Circuit correctly noted that its holding does not strip the courts of their responsibility to review the adequacy of the facts presented to the fact-finder. *Sheridan*, 100 F.3d at 1072. Judgment as a matter of law remains appropriate where there is insufficient evidence to permit a reasonable trier of fact to find that the explanation proffered by the employer is not truthful. *Sheridan*, 100 F.3d at 1072.

In *Rhodes*, The Fifth Circuit, sitting *en banc,* discussed the viability of verdicts based solely on evidence of a prima facie case of discrimination and the jury's disbelief of the employer's proffered explanation. ". . . [O]rdinarily such verdicts would be supported by sufficient evidence, but not always." *Rhodes,* 75 F.3d at 993. The *Rhodes* court, however, found that judgment as a matter of law was not appropriate in that case because the plaintiff had proven sufficient facts to show that his termination was based on his age. *Rhodes,* 75 F.3d at 996.

While the precise breakdown of the circuits on the appropriate interpretation of *Hicks* is not germane to this case,

as discussed below, KARE's mischaracterizations of the decisions of other circuits in the Petition require correction. *See* Sup. Ct. R. 15.2.

KARE cites *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) and *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994)[5] as having holdings which are consistent with the *Rhodes* court's conclusion. As in *Rhodes*, the decisions in the *Isenbergh* and *Woods* cases turn on findings that the plaintiffs failed to provide sufficient evidence to establish that their employers' proffered reasons for their actions were pretextual. The "holdings," therefore, are merely *dicta*.

KARE also cites *Chertkova v. Connecticut General Life Ins. Co.*, 92 F.3d 81 (2d. Cir. 1996) as being similar to *Rhodes*. In *Chertkova*, the Second Circuit found that the plaintiff had presented evidence from which a jury could infer discrimination. The court's statement, cited by KARE, that an employee must show that the reason given by the employer for discharge was false and that the real reason was discrimination simply recognizes that "pretext" means "pretext for discrimination." *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 516 (1993); *but see Guadagno v. Wallack Ader Levithan Associates*, 950 F. Supp. 1258 (S.D.N.Y. 1997). The *Chertkova* case does not address the propriety of a motion for summary judgment or judgment as a matter of law where there is evidence of a prima facie case and pretext for discrimination.

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[5] The language KARE quotes from the *Woods* case is actually an internal citation to *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994).

In *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir.), *cert. denied* ___ U.S. ___, 116 S. Ct. 380 (1995), also relied upon by KARE to show a split with *Sheridan*, the Fourth Circuit reviewed a trial court's finding after a bench trial. The appellate court rejected the trial court's factual finding that the plaintiff had rebutted the university's reason for denying tenure. Like the *Chertkova* court, the Fourth Circuit embraced the *Hicks* distinction between pretext and pretext *for discrimination.* The *Jiminez* court, however, did not reach the issue of when an inference of discrimination can be drawn from a showing that an employer's proffered reason is false.

KARE's most egregious misstatement of law involves the Sixth Circuit's decision in *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994). KARE contrasts *Manzer* with cases holding that the jury is always entitled to draw an inference of discrimination from the prima facie case and a showing of pretext. The *Manzer* court, however, held,

> . . . *Hicks* clarified that the only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation 'unworthy' of belief.

Manzer, 29 F.3d at 1083 (emphasis in original). KARE's citation to the language in *Manzer* regarding a requirement of additional evidence of age discrimination is taken out of context.[6] *Manzer*'s requirement of additional evidence applies only where the plaintiff attempts to use the prima facie case to establish that "the sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that the employer's explanation is a pretext. . . ." *Manzer*, 29 F.3d at 1084. In other words, *Manzer* requires some evidence beyond the prima facie case to establish pretext; it does not require additional evidence beyond pretext.

Regardless of whether, or to what extent, a split exists, this is not a proper case for the Court to address issues raised by the application of *Hicks*. The Eighth Circuit has already affirmed the verdict for Ryther under the strictest standard applied by the circuits. KARE incorrectly aligns the Eighth Circuit's position with the Third Circuit in *Sheridan*. The Eighth Circuit, in language ignored by KARE, distinguished its holding from *Sheridan*: "*Sheridan* does not expressly acknowledge, as we do today, that evidence of pretext *does not always* support an inference of intentional discrimination." App. 8, n. 2 (emphasis in original). Contrary to KARE's contention, the Eighth Circuit's decision is similar to the opinion in *Rhodes*, which measures the submissibility of the plaintiff's case against a higher standard than required in *Sheridan*. Any clarification by this Court of the *Hicks* standard will not impact the result in this case.

If this Court was to accept the view espoused by the Third Circuit. Ryther would prevail. There is no doubt that he established a prima facie case and evidence of pretext. App.,

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[6] KARE's quote from *Manzer* appears on page 1085 of the decision not 1083 as cited. Petition, p. 28.

p. 28. Acceptance of the standard adopted by the Fifth Circuit, likewise, would not affect the Eighth Circuit's decision. It already adopted such a standard and determined that Ryther submitted additional evidence of age discrimination beyond pretext, which was sufficient to allow the jury to find in his favor.

> We hold the record as a whole supports a reasonable inference that *age discrimination* motivated KARE 11's decision not to renew Ryther's contract. The plaintiff produced overwhelming evidence as to the elements of a prima facie case, and strong evidence of pretext, which, when considered with indications of age-based animus in Ryther's work environment, clearly provide sufficient evidence as a matter of law to allow the trier of fact to find intentional discrimination. As the experienced district judge stated, "[i]t is clear that the jury believed Ryther's evidence and did not believe defendants' proffered explanation." *Ryther*, 864 F. Supp. at 1517.

App., p. 28.

Given the standard employed by the Eighth Circuit *en banc*, KARE can only achieve reversal of the jury's verdict if this Court re-evaluates the facts of this case and accepts the facts most favorable to KARE as set forth in the Petition's

Statement of the Case. KARE's statement that Thomas Kirby, a former KARE news executive, had decided to terminate Ryther, is a good example of how KARE has erroneously presented the facts in the light most favorable to it. KARE ignores the testimony of William Jones, Ryther's negotiating agent, that Kirby engaged in enthusiastic negotiations to renew Ryther's contract. *Compare* Petition, p. 5 *with* TR IV/38-39. Re-examination of the factual record is not the role of the Supreme Court. This case has not met the high standard for review by certiorari. *See* Sup. Ct. R. 10.1.

IV. FINAL RESOLUTION OF THIS CASE SHOULD NOT BE DELAYED IF CERTIORARI IS GRANTED IN ANOTHER CASE ON THE *HICKS* ISSUE.

On February 3, 1997, a petition for writ of certiorari was filed in *Sheridan v. Du Pont deNemours & Co.*, 100 F.3d 1061 (3d. Cir. 1996) *(en banc)*. As discussed above, neither an affirmance or reversal of *Sheridan* will impact the Eighth Circuit's result in *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997) (*en banc*). Accordingly, final resolution of this case, which has been delayed for more than three and one-half years from the date of the jury verdict, should not await determination by this Court if certiorari is granted in the *Sheridan* case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

April 22, 1997 Respectfully submitted,

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No. 96-1571

In The

Supreme Court of the United States

October Term, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

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C. THOMAS RYTHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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II. THE EIGHTH CIRCUIT INCORRECTLY STATED AND APPLIED THE STANDARD FOR JUDGMENT AS A MATTER OF LAW BY FINDING THAT EVIDENCE OF PRETEXT WITHOUT ANY EVIDENCE OF AGE BIAS BY THE ACTUAL DECISIONMAKERS SUPPORTED THE JURY VERDICT. 5

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This case presents the Court with an opportunity to provide much needed clarification on two important issues that have divided the lower courts as they struggle with how to interpret *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). First, lower courts need guidance on how to instruct juries in discrimination cases, as dramatically evidenced by the Eighth Circuit's even split over whether the jury instruction in this case correctly stated the proof required by the plaintiff to prevail in his age discrimination case. Second, this case presents the opportunity to clarify the proper standard and application of that standard when faced with motions for summary judgment or judgment as a matter of law. Despite respondent's protests to the contrary, this case squarely presents both issues for this Court's review.

I. THE CENTRAL JURY INSTRUCTION IN THIS CASE TOLD THE JURY IT COULD RULE FOR PLAINTIFF IF PLAINTIFF PROVED THE ELEMENTS OF A PRIMA FACIE CASE AND OMITTED THE CRITICAL REQUIREMENT FROM *HICKS* THAT PLAINTIFF BEARS THE ULTIMATE BURDEN OF PROVING INTENTIONAL DISCRIMINATION ON THE BASIS OF AGE.

The jury instruction question directly presented by this case is whether a trial court must include the *Hicks* requirement that plaintiff always bears the ultimate burden of proving intentional discrimination on the basis of age in a case where the court otherwise instructs using the burden-shifting language from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There is no dispute that KARE asked several times for this language in the jury instruction conference and raised it in each step of

the appeal,[1] resulting in a divided opinion by the Eighth Circuit sitting en banc.

As pointed out in the petition, the jury instruction question presented here is in fact part of a larger question with which the circuits are struggling, namely, how to instruct juries in discrimination cases given the *McDonnell Douglas* paradigm and the *Hicks* interpretation laid down by this Court. While respondent spends time arguing that the larger question is not presented here, he is in fact wrong, both technically and practically.

Technically, although the issue of whether trial courts *had* to instruct using the burden-shifting language was not the focal point of the appeal, the en banc Eighth Circuit in fact actually decided that question. The en banc court ruled, 7-5, that although a previous Eighth Circuit decision had said that district courts were "constrained to instruct juries on the elements of a prima facie case," a majority of the en banc court ruled in this case that district courts were not so constrained. *See* Pet. at 19 & n. 5; Pet. App. 1 n. * and 42. Thus, the question of whether trial courts *must* instruct using the burden-shifting language was actually decided by the Eighth Circuit en banc in this case, and is available for review by this Court in this decision.

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[1] *See* Pet. at 11; Tr. VII/170-179. As the dissenting judges noted:

> [T]he court instructed that the jury could find for Ryther if he proved the elements of a prima facie case. That is wrong under *Hicks*. . . . KARE 11 preserved the issue by objecting to this aspect of Instruction 20 and proposing alternative instructions.

Pet. App. 43-44.

Practically, what respondent fails to acknowledge is that the question of whether a trial court should or should not instruct using the burden-shifting language is the backdrop against which the instructional error in the first question presented stands out clearly. That some courts say a jury should *only* consider the ultimate question of whether the plaintiff has borne the burden of proving discrimination on the basis of an impermissible factor such as age sharply contrasts with both the trial court's failure here to give the requested instruction about that ultimate burden and the en banc court of appeal's even split on whether the instruction as given by the trial court was correct or was reversible error.

Respondent's argument that the Eighth Circuit majority opinion does not directly discuss the leading national treatise on jury instructions, E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* (hereinafter "Devitt & Blackmar"), also misses the point. The trial court said Instruction 20 "was drawn primarily" from Devitt & Blackmar, and expressly relied on Devitt & Blackmar to support its conclusion that Instruction 20 correctly stated the law. Pet. App. 107. As made clear in the petition by full quotes from both the pattern instruction and Instruction No. 20, Pet. at 9-10, 16-17, both "instructed that the jury could find for Ryther if he proved the elements of a prima facie case," Pet. App. 43, and neither instructed that the ultimate burden to prove discrimination on the basis of age remains with the plaintiff after all the shifting is done. That there may be additional errors in the pattern instruction does not correct the errors that are present in both, and it was over those common errors that the en banc court of appeals was evenly divided.

Respondent also fails to acknowledge the significance of the errors, but that did not escape the dissenting judges of the en banc court:

> The jury was erroneously instructed that it could find for Ryther if he proved the elements of a prima facie case. It was later instructed that Ryther must prove pretext for intentional discrimination. The earlier error was not explicitly corrected, and the relationship between the two conflicting instructions was not explained. As the prima facie case is easy to prove, the first instruction invited the jury to render a verdict for Ryther if it concluded KARE 11 had treated him unfairly. The second instruction limited the jury to its proper role under ADEA. Because the issue is critical to the scope of the federal statute, because the evidence of intentional age discrimination in this case was weak at best, and because we cannot know which instruction the jury obeyed, KARE 11 is entitled to a new trial.

Pet. App. 45.[2] It was thus obvious to the dissenting judges that a correct instruction would have affected the

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[2] Where, as here, the principal instruction erroneously explains how the burden of proof can be fulfilled, a separate, general instruction merely stating that plaintiff bears the burden of proof does not cure that defect. That was one of the problems in *Francis v. Franklin*, 471 U.S. 307 (1985), that is analogous to this case. *See id.* at 319. Another was the problem, as noted in the quote from the dissenting judges above, of knowing which instruction the jury obeyed:

> Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two

outcome, and will do so if this Court remands after deciding the first question presented in petitioners' favor here.

II. THE EIGHTH CIRCUIT INCORRECTLY STATED AND APPLIED THE STANDARD FOR JUDGMENT AS A MATTER OF LAW BY FINDING THAT EVIDENCE OF PRETEXT WITHOUT ANY EVIDENCE OF AGE BIAS BY THE ACTUAL DECISIONMAKERS SUPPORTED THE JURY VERDICT.

Respondent argues that KARE mischaracterizes the Eighth Circuit's standard for ruling on judgment as a matter of law in a discrimination case, but his support is long on quotes and short on analysis. The court of appeals majority did begin by properly quoting from *Hicks*, but it then veered from the appropriate standard and revealed the fundamental error of its decision: It acknowledged serious doubt about the adequacy of the evidence other than that of pretext, stating: "It remains an open question whether, standing alone, this evidence would support the jury's verdict," Pet. App. 18, and it then stated the pivotal importance of the pretext question here: "The *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior." *Id.*

> irreconcilable instructions the jurors applied in reaching their verdict. Had the instruction [at issue] . . . been followed by the instruction "*this means that . . .*," a somewhat stronger argument might be made that a reasonable juror could not have understood the challenged language as shifting the burden of persuasion to the defendant.

Id. at 322-323 (emphasis in original).

(emphasis in original). Significantly, respondent says nothing about that part of the court's decision.

In the part of the decision that respondent does quote, the court states that evidence of pretext will not always support an inference of discrimination, leading respondent to conclude that this means the Eighth Circuit has adopted and applied the "strictest standard" of all the circuits. Br. in Opp. at 16. But a careful reading of the decision shows that even this part in fact places the Eighth Circuit with those other circuits which do not require additional evidence beyond pretext to deny a motion for judgment as a matter of law.

The majority twice states that only evidence of pretext which is "inconsistent" with an inference of intentional discrimination will result in judgment as a matter of law for the defendant. *See* Pet. App. 8, n.2 ("[T]here may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination."); Pet. App. 9 ("We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.") By this the court is *not* saying that plaintiff must offer some evidence of discrimination beyond pretext to send the case to the jury. Instead, the court is only saying that a plaintiff will lose as a matter of law if the plaintiff's evidence of pretext is itself inconsistent with discrimination.

Proof that this is what the court of appeals majority had in mind is given by the examples it cited. *See* Pet. App. 9 n. 4. In both *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), and *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986), the proof of pretext itself proved the discrimination in question was not age

based. In *Rothmeier,* the plaintiff proved the employer's proffered reason was false by showing the actual reason he was fired was that he confronted his employer about the company's alleged SEC violations. *Rothmeier,* 85 F.3d at 1337. In *Barber,* the employees' proof of pretext was that others within their own age group were given privileges denied to them. *Barber,* 791 F.2d at 660. Because in each case the plaintiffs offered a specific reason as proof of pretext that was inconsistent with age discrimination, they could not prove discrimination as a matter of law.

The Eighth Circuit's holding thus means that a plaintiff can survive judgment as a matter of law simply by showing pretext, as long as the plaintiff does not take it a step further and offer as proof of pretext a reason inconsistent with age discrimination. Ryther did not kill his own case as the plaintiffs did in *Rothmeier* and *Barber* because Ryther did not offer evidence of a specific nondiscriminatory reason why the decisionmakers decided not to renew his contract. The particular executives at KARE who decided not to renew Ryther's contract have consistently said the reason for their decision was years of poor market research results, including, importantly, the most recent survey. Ryther challenged that reason, claiming that the decision had been made before the latest market research was performed. This fact, if true, creates no inference either way that the actual decision was based on age. It therefore meets the majority's standard that the evidence of pretext is not "inconsistent" with an inference of age discrimination. It does not mean, however, that such evidence affirmatively supports a finding of intentional age discrimination.

Here, respondent has not called to the Court's attention any evidence from the record to contradict petitioner's accurate assertion that there was no evidence of age bias by the actual decisionmakers.[3] Instead, Ryther points to stray remarks made by subordinates who had no involvement with the decision not to renew Ryther's contract, and to adverse employment actions taken against other employees in dissimilar circumstances with different decisionmakers. Thus, the second question presented to which respondent objects accurately and carefully states the evidentiary circumstances in which the Eighth Circuit applied its interpretation of *Hicks*.[4]

The question presented and the text of the petition thus correctly present to the Court the facts of this case from which both the verdict and the refusal to grant judgment as a matter of law were derived: there was unrelated "age" evidence, but no evidence of age bias by the decisionmakers, i.e., no evidence that the actual decision not to renew plaintiff's contract – the "discrimination" against plaintiff – was on the basis of age. So while there was "age" evidence offered, there was no evidence that the *actual employment action against Ryther* was, in the language of the statute itself, taken *"because of such individual's* age." *See* 29 U.S.C. § 623(a)(1), (2) (emphasis

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[3] This Court may thus take that fact as a given. S. Ct. R. 15.2.

[4] Respondent is also wrong in saying that the facts of stray comments by nondecisionmakers and actions against dissimilar employees are raised in the question presented but not otherwise addressed. They are discussed throughout the petition, both directly, *see* Pet. pp. 8-9, 12, and indirectly in the repeated emphasis that there was no evidence that the actual decisionmakers had any age bias. *See* Pet. pp. 23-25.

added), reprinted in the Petition at 2. That leaves only the prima facie case and evidence of pretext, and belies respondent's suggestion that the standard made no difference here. *See* Br. in Opp. at 16-18. Had a requirement that there be evidence beyond a mere showing of pretext actually been applied, the fact that there was no evidence of age discrimination by the decisionmakers against this individual would have mandated judgment as a matter of law for KARE.

Thus, the Eighth Circuit's decision in this case is aligned with the Third Circuit's en banc decision in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996), *petition for cert. pending* (No. 96-1231), and at odds with the en banc Fifth Circuit decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (3d Cir. 1996). As pointed out in the petition, the remaining circuits are also divided, sometimes even within the circuit. Although respondent disagrees with exactly where particular circuit decisions fall along the continuum between *Sheridan* and *Rhodes*,[5] he agrees that "the precise breakdown of the circuits is

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[5] For example, respondent takes issue with KARE's listing of the Sixth Circuit's decision in *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994) on the "pretext plus" side of the ledger. A careful reading of that court's decision reveals that KARE's listing is correct for a case such as Ryther's. In *Manzer*, the court noted that there are different types of evidence which can be offered to show pretext, and did state that, in some cases, the evidence of pretext will be such that a plaintiff will not need to offer additional evidence beyond pretext to prove intentional discrimination. *Id.* at 1084. But the Sixth Circuit also clearly stated that where pretext is shown by an indirect challenge to the employer's credibility, as Ryther attempted here, a plaintiff must offer some specific evidence of age discrimination in addition to the evidence of pretext. *Id.* at 1084-85.

not germane," Br. in Opp. at 13, and he does not dispute that the issue is causing confusion. In fact, it has resulted in a split among the circuits deep and pervasive enough for three circuits to have addressed the issue en banc in less than a year and to have reached different conclusions. The confused nature not only of the state of the law among the circuits but within this very decision of the en banc Eighth Circuit is demonstrated in many ways, but none more telling than the fact that both the petitioner and the respondent in *Sheridan* have each cited the Eighth Circuit en banc majority decision as supporting their own diametrically opposing views of the correct state of the law. *See* Respondent's Brief in Opposition in No. 96-1231 at 8; Petitioner's Reply Brief in No. 96-1231 at 2.

CONCLUSION

What all this demonstrates, of course, is that an important federal legal standard which ought to be applied uniformly throughout the circuits is in need of clarification by this Court, both for judgment as a matter of law and for jury instructions. For the foregoing reasons and the reasons set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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